Neutral Citation Number: [2023] EWHC 133 (Fam)

Case No: MA22C50418

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Liverpool Civil and Family Justice Centre
Vernon Street
Liverpool
L2 2BX

Date: 27/01/2023

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

Manchester City Council	**Applicant**
- and -	
CP	**First Respondent**
-and-	
DT	**Second Respondent**
-and-	
P	**Third Respondent**
(A Child acting by her Children's Guardian)	

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- -

Ms Emma Whelan (instructed by **Manchester City Council**) for the **Applicant**
The First Respondent did not appear and was not represented
The Second Respondent did not appear and was not represented
Miss Martine Swinscoe (instructed by **Alfred Newton Solicitors**) for the **Third Respondent**

Hearing dates: 17 January 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE MACDONALD

Mr Justice MacDonald:

INTRODUCTION

1. The subject child in these proceedings is P, who was born in January 2007 and has therefore just turned sixteen years of age. She is represented by Miss Martine Swinscoe of counsel. She was made subject of a full care order on 16 January 2023 by order of HHJ Woodward upon the application of Manchester City Council, represented by Ms Emma Whelan of counsel. Neither parent appears or is represented. The local authority today urges the court to make an order under its inherent jurisdiction authorising restrictions that it submits amount to a deprivation of P's liberty for the purposes of Art 5(1) of the ECHR, on the grounds that such an order is in P's best interests.

2. In circumstances where the local authority seeks to include in that order the authorisation of restrictions on the use by P of her mobile telephone, this case raises the question of whether such steps constitute a deprivation of liberty for the purposes of Art 5 of the European Convention on Human Rights (hereafter the ECHR), such that the High Court has jurisdiction to authorise those steps as being in P's best interests, in a deprivation of liberty safeguards order (known, colloquially, as a DOLS order). The court is aware that, to date, it has been the practice to include provisions removing or restricting the use of a child's mobile phone in orders authorising restrictions that constitute breaches of the child's Art 5 right to liberty. Indeed, this court took that step in *Salford City Council v NV, AM, M (By her Children's Guardian)* [2019] EWHC 1510 (Fam).

3. The question before the court in this case arises in the context of the ongoing need for the High Court to utilise the inherent jurisdiction to authorise the restriction of children's liberty in order compensate for the acute lack of appropriate secure placements for vulnerable children with the type of needs exhibited by P. In doing so, the High Court is deploying its inherent jurisdiction to authorise the *breach* of the child's Art 5 right to liberty, albeit where that authorisation is demonstrated to be in the child's best interests. The difficulties of deploying such a jurisdiction have been repeatedly articulated by the judges sitting in this Division. Within the context of these now well rehearsed difficulties, it is a deeply discomforting jurisdiction to have to exercise. Those difficulties throw into sharp relief the very real need in these cases to avoid the tug of pragmatism (see *Rehan Malik v Governor of HM Prison Hindley (No.2)* [2022] EWHC 2684 (Admin) per Fordham J) and to keep the exercise of this draconian jurisdiction within its proper bounds.

BACKGROUND

4. P was born on 12 January 2007 and is now 16 years old. She has a diagnosis of ADHD. An educational psychologists report completed in 2020 indicated that P is working at the level of a 7 year old child. P also presents as a young person who has a sense of humour and is not shy in expressing her personality. She is described by her Children's Guardian as a funny, likeable, and kind young person with skills in creative arts, including making TikTok videos, and a love of animals.

5. P's mother is CP and her father is DT. The local authority asserts that P has suffered physical abuse from her father, who has a history of drug misuse, and has been involved in violent incidents with her mother (including violent incidents arising from her mother

asking to look at P's mobile phone in order to safeguard her). Between June 2020 and June 2021, P was missing from home on multiple occasions. P also threatened to harm her mother and her brother with a knife and engaged in repeated acts of self harm, including attempts to take her own life. When missing, the local authority considers that P has placed herself at risk of child sexual exploitation (CSE) and involvement in organised criminal gangs (OCGs).

6. P was placed in the care of the local authority under s. 20 of the Children Act 1989 on 9 June 2021, following the police exercising their powers of protection in circumstances where P's behaviour was escalating significantly. She was placed in a four bedroomed children's home for children with learning disabilities, before being moved to another children's home in which she was also one of a number of children in the placement. During this period, P continued to attempt to take her own life. In January 2022, P was admitted to Y hospital for a period of four weeks. On 7 February 2022, P moved to an alternative solo placement called FW. That placement was unregistered. Following a further attempt on her life, P was admitted to X hospital on 29 May 2022 for an extended period whilst an alternative placement was sought. Up to that point, P's acts of self harm had been extensive, including overdoses, swallowing various items, including liquids, cutting herself, burning herself with aerosol cans, banging her head against hard objects/windows, taking herself to motorway bridges and ligature attempts. However, following assessments in April 2022, May 2022 and June 2022, mental health professionals concluded that P did not meet the criteria for admission to a Tier 4 CAMHS bed.

7. On 21 June 2021, the local authority issued proceedings under Part IV of the Children Act 1989 in respect of P. Following her discharge from X hospital on 1 August 2022, P moved back to her former solo placement at FW. An interim care order under s.38 of the Children Act 1989 was made on 24 June 2022. An order authorising restrictions that amounted to a deprivation of P's liberty for the purposes of Art 5(1) of the ECHR was also made on that date. The restrictions authorised in the order of 24 June 2022 did not, at that stage, include any restrictions referrable to P's mobile phone, tablet and laptop or her access to social media. The order of 24 June 2022 was renewed in the same terms on 13 July 2022, 25 July 2022, 29 July 2022 and 22 August 2022. None of those subsequent orders included restrictions referrable to the use of P's electronic devices or her access social media.

8. On 1 September 2022, the order authorising restrictions on P constituting a deprivation of liberty under Art 5(1) of the ECHR was extended to include restrictions on P's mobile telephone, tablet and laptop and her access to social media. A copy of that order is not before the court. However, on 12 October 2022 HHJ Woodward, sitting as a Judge of the High Court, further extended the order of 1 September 2022. The order of 12 October 2022 again specified extensive restrictions referable to the use of P's mobile phone as follows:

> "(j) P is to not have her mobile phone, tablet or laptop from the hours of 22:00 – 08:00 the following morning. The mobile phone and any other devices where she may contact her peers is to be charged by staff and kept in the office overnight.
>
> (k) P to not be given access to use the house phone. If P wishes to speak to her parents, they are to contact her on her mobile.

(l) P to be supervised when making calls to friends and her peers, this will be recorded, logged, and shared with the social worker.

(m) Wi-Fi is to be turned off to restrict P's social media when there are worries around her behaviour.

(n) P's phone to be taken away by placement staff if they feel that P's behaviours are escalating.

(o) If P takes video recordings of staff, staff have permission to go on P's phone and delete the video.

(p) Staff to not provide P a top-up, P is to use Wi-Fi only so placement staff have control over P accessing social media.

(q) Placement staff may use apps to monitor P's online safety.

(r) P to not be able to take her mobile phone to the bathroom, she must hand her phone over to placement staff.

(s) P is to allow the placement staff to check her mobile telephone and / or any other internet enabled device that she may have the use of and any issues of concern are to be recorded logged and reported to the social worker."

9. As to the evidential justification for these restrictions, a Children's Needs Assessment dated 10 August 2022 noted that telephone and social media contact between P and her friends could be negative as well as positive. In her third statement dated 26 August 2022, which statement is the verbatim source of the restrictions concerning the electronic devices and access to social media that are contained in the order of 12 October 2022, the social worked expanded on those concerns as follows:

"The local authority is requesting that P is to not have her mobile phone from the hours of 22:00 – 08:00 the following morning. The mobile phone is to be charged by staff and kept in the office overnight. The local authority feels this is necessary as when P settles in the evening in her bedroom, the supervision is reduced, and this is when P will speak to her friends online. When P is unhappy, her peers have been known to encourage P to show behaviours such as, shouting at staff, being verbally aggressive and demanding; resulting in aggression shown if P is told 'No'. It is a worry that P is sharing her address with her friends and the local authority do not know if the friends she has shared this with poses a risk to her, and if these individuals are people that P knows. P has shown a new behaviour of recording staff and the local authority cannot be ascertained that P has not posted this online or shared this with her peers. P could be placed at risk of significant harm if this has been shared with individuals that pose a risk towards her and the staff.

P to be supervised when making calls to friends and her peers, this will be recorded, logged, and shared with the social worker. The local authority is worried that P is befriending individuals online who she may not know, this may [be] to seek emotional support. We know that some of P's friends are

> from her previous placements, and we know that some of her friends pose a risk towards her such as, P has a friend who has a DOLS and has another female friend who she alleges sexual abuse towards her back in November 2020. It is a worry that P is at a key stage of her development where she is learning who is a positive friendship and who is not, and it is a worry that some of her peers may be encouraging behaviours that are not safe resulting in further harm. It is unknown to which peer she was speaking to on 24 August but what we know is the female was telling P tactics of restricting holds so she can escape, again, causing P to be at risk of harm as she is being held to keep her safe when she is attempting to harm herself. It is the local authorities view that FW care staff need to record logs of who P is speaking to so the local authority can keep P safe from harm. P is needing a higher level of supervision in evenings when on the phone with her peers.
>
> Wi-fi is to be turned off to restrict P's social media when there are worries around her behaviour. This is to ensure that P's behaviours do not continue to escalate, as during incidents P has contacted her family or friends and this has heightened P's risks as she may be trying to impress others. We know from the incident dated 24 August 2022, that P had contacted a friend and a call had been made to the Ambulance Service who were concerned of P's welfare. We also know that P has been taking video recordings of staff during the incident and this prevents P from being able to post this online. It is the view of the local authority, in the event, P takes videos of staff that staff should be able to delete these from P's phone or observe P delete the videos for their safety in case P posts the videos online or shares this with her peers.
>
> Given P's current displayed behaviours, it is felt necessary that the placement staff may use apps to monitor P's online safety. It is the local authorities view that this is necessary to keep a log of who P is speaking to and to ensure P is not placed at significant risk to individuals that may be older than her or individuals that she does not know. P will not be provided with top up for her mobile until P can show a level of understanding towards keeping safe online, this will be monitored and discussed within weekly meetings with professionals to review this. If P wishes to speak to her family or friends, they can contact her over social media or contact her directly by calling her. It is the local authorities view that giving P access to the work landline will cause further complications and behaviours in the event P may demand to use it."

10. With respect to the outcome of these restrictions, in her fifth statement dated 12 September 2002, the allocated social worker states that P was allowing placement staff to check her mobile phone daily and there had been no further reports of concerns with respect to whom P was speaking to. P had also begun completing some work with the placement staff around how to keep herself safe online and understand the dangers of speaking to unknown individuals. There had only been two occasions when P refused to hand over her mobile phone.

11. In his report dated 30 September 2022, the Children's Guardian noted that P presented as not objecting to the restrictions in place in respect of her mobile phone and being content to hand it over to staff when requested. She made attempts to reassure the Children's Guardian that she knew everyone she messaged and that she was aware she had to hand over her phone to be checked by staff in any event. In a position statement

lodged with the Court on behalf of the Children's Guardian dated 10 October 2022, it was recorded that "In respect of the restrictions, P was most concerned about her mobile phone and in particular she wanted to be able to have her phone charger during the day."

12. On 26 October 2022, FW gave notice on P's placement following difficulties with staffing, the reasons for which it is not necessary to recount in this judgment. The giving of notice was *not* due to P's behaviour and at this time P had made progress at FW. In these circumstances, pending a move to a further placement, the local authority staffed FW in order to cover the period required to allow P to transition to another placement. In the period following notice being given, P did become more dysregulated. On 22 December 2022, P kicked an agency staff member in the stomach and headbutted the staff member to the face, thereby necessitating the staff member attending hospital. On 3 January 2023, P was taken to the Emergency Department at X hospital after she had climbed through a downstairs window and was threatening to harm herself by throwing herself from a motorway bridge. P also tried to self-harm by using an aerosol can on her hand and foot.

13. On 17 January 2023, P was moved to a further placement at PT. Once again, the placement is unregistered with Ofsted. It is however, registered with the Care Quality Commission (CQC). On 9 December 2022, Ofsted wrote to PT to confirm that another of their placements registered with the CQC, which the local authority asserts is almost identical to the provision now being provided by PT to P, does not meet the definition of a children's home under the Care Standards Act 2000, and accordingly does not constitute the operation of an unregistered children's home. The local authority has asked Ofsted to confirm that the same position will pertain in relation to the placement provided by PT to P. A response is awaited.

14. The local authority now seeks a further order authorising the restrictions that are in place at the new placement and which it submits constitute a deprivation of P's liberty for the purposes of Art 5(1) of the ECHR. On 21 June 2022, the social worker considered that P had capacity with regard to the question of restrictions and did not agree the restrictions the local authority sought in order to keep her safe. However, in her latest statement, the social worker assesses P not to be competent at present to consent to the deprivation of her liberty. The Children's Guardian is of the same view.

15. In the draft order provided to the court at the outset of this hearing, the local authority sought authorisation for 3:1 supervision for P inside and outside the placement, the use of physical restraint inside and outside the placement where required to protect P from physically harming herself, regular supervision and observation, the removal from P of items that she may use to harm herself, access to P's rooms and restriction on P's access to the kitchen and staff room. The specific restrictions regarding the use by P of her mobile phone that the local authority submits constitute a deprivation of P's liberty for the purposes of Art 5(1) were as follows:

    i) P is not to be given access to use the house phone. If P wishes to speak to her parents, they are to contact her on her mobile.

    ii) P is to be supervised when making calls to friends and her peers, these will be recorded, logged, and shared with the social worker.

iii) Wi-Fi is to be turned off to restrict P's social media when there are worries around her behaviour.

iv) P's phone is to be taken away by placement staff if they feel that P's behaviours are escalating or if her use is negatively impacting on her wellbeing.

v) If P takes video recordings of staff, staff have permission to go on P's phone and delete the video.

vi) Staff are not to provide P with a top-up, P is to use Wi-Fi only so placement staff have control over P accessing social media.

vii) P is not to be able to take her mobile phone to the bathroom, she must hand her phone over to placement staff.

viii) P is to allow the placement staff to check her mobile telephone and / or any other internet enabled device that she may have the use of and any issues of concern are to be recorded logged and reported to the social worker.

16. This matter was listed before HHJ Woodward on Monday 16 January 2023 to consider renewal of the DOLS order, including the foregoing restrictions. In the context of concerns about whether restrictions on the use of a phone and other electronic devices could be said to constitute a deprivation of liberty for the purposes of Art 5(1), HHJ Woodward reallocated the matter to me for hearing. Both the local authority and the Children's Guardian take the primary position that the removal of, or the restriction of the use of, P's mobile phone and other devices *does* constitute a deprivation of liberty under Art 5(1) of the ECHR.

17. On behalf of the local authority, Ms Whelan submits that such steps are an integral *element* of the continuous supervision and control and lack of freedom to leave that marks P out as being deprived of her liberty, having regard to the test articulated in *Cheshire West and Chester Council v P* [2014] AC 896 in the context of the prior decisions of the ECtHR, including *Storck v Germany* (2006) 43 EHRR 6. Ms Whelan submits that the restrictions on P's mobile phone (and the associated restrictions concerning her tablet, laptop and access to social media) amount to a deprivation of liberty for the purposes of Art 5(1) when viewed in their proper context, namely as an essential *element* of the restrictive regime that deprives P of her liberty, without which the regime restricting P's liberty could not be effective (Ms Whelan conceded that the authority for the proposition that, cumulatively and in combination, the elements comprising the implementation of a measure can amount to a deprivation of liberty, namely *Guzzardi v Italy* (1980) 3 EHRR 333, was decided on very different facts).

18. In the circumstances, Ms Whelan submits that the act of removing or restricting use of her mobile phone, tablet and laptop and restricting her access to social media, constitutes a deprivation of P's liberty and thus can be authorised by the court under its inherent jurisdiction where such a course is in P's best interests. In that latter regard, Ms Whelan points to the evidence that, prior to the restrictions concerning her devices being in place, P was speaking to peers who encouraged P to show behaviours such as, shouting at staff, being verbally aggressive and demanding, was sharing her address with her friends, befriending individuals online who she may not know and, on 24

August 2022, speaking to a female who told P tactics for restricting holds designed to prevent her harming herself so she could escape from such holds.

19. On behalf of P, Miss Swinscoe submits that the argument advanced by the local authority is brought into even sharper relief in circumstances where for P, in common with most children of her generation, a mobile phone is an integral aspect of what she considers to be her liberty. Echoing Ms Whelan's submission that, for P, her mobile phone is very much an avenue to the outside world, particularly whilst locked behind closed doors, Miss Swinscoe points to the fact that the restrictions about which P is particularly concerned in this case are those placed on her mobile phone and social media access. Within this context, and in circumstances where the ECHR is said to be a 'living instrument', Miss Swinscoe submits that the meaning of liberty for a young person today is very different to the meaning of liberty when Sir David Maxwell-Fyfe, First Earl of Kilmur, was overseeing the formulation of the ECHR at the end of the Second World War, as Chair of the Council of Europe's Legal and Administrative Division. In this context, Miss Swinscoe submits that a restriction on the use of P's mobile phone, tablet and laptop, and the concomitant restriction of her access to social media, fits within Lord Kerr's formulation of the meaning of liberty in *Cheshire West* at [76] (emphasis added):

> "While there is a subjective element in the exercise of ascertaining whether one's liberty has been restricted, this is to be determined primarily on an objective basis. Restriction or deprivation of liberty is not solely dependent on the reaction or acquiescence of the person whose liberty has been curtailed. Her or his contentment with the conditions in which she finds herself does not determine whether she is restricted in her liberty. *Liberty means the state or condition of being free from external constraint*. It is predominantly an objective state. It does not depend on one's disposition to exploit one's freedom. Nor is it diminished by one's lack of capacity."

20. In the alternative, both the local authority and the Children's Guardian contend that if the removal of, or the restriction of the use of, P's mobile phone, tablet and laptop, and restriction of her access to social media, do not constitute a deprivation of liberty for the purposes of Art 5(1), in circumstance where s.8 is not available in respect of a child who is the subject of a care order, the court can in any event, where necessary, authorise such a course under its inherent jurisdiction in the best interests of P.

21. Ms Whelan did not seek to dispute the proposition that, in principle, it would be open to the local authority to regulate P's use of her mobile phone by exercising its parental responsibility under the care order pursuant to s.33 of the Children Act 1989, albeit that Ms Whelan expressed some concern, where P is now 16 years old, with respect to resorting to s.33 of the 1989 Act without guidance from the court that this constitutes a legitimate course (in circumstances where the courts have in other cases demarcated the ambit of s.33 of the Act, for example in *Re H (A Child)(Parental Responsibility: Vaccination)* [2020] EWCA Civ 664).

22. Ms Whelan submits, however, that where P refuses to co-operate with restrictions on her mobile phone, usually in times of emotional dysregulation where there is a risk that P will become violent, and where the use of her mobile phone is threatening her safety, for example by exposing her to contact with unknown individuals who may pose a risk of child sexual exploitation, it must remain open to the court to make an order under

the inherent jurisdiction to remove or restrict the use of P's devices in her best interests. Ms Whelan drew analogies with other cases in which the court utilises its inherent jurisdiction to impose steps upon a child designed to prevent the child suffering harm, for example were treatment is imposed on children suffering from anorexia nervosa (see *Re C (Detention for Medical Treatment)* [1997] 2 FLR 180). Ms Whelan submits that an order giving effect to the restrictions sought with respect to P's mobile phone, tablet, laptop and access to social media would, in circumstances where their use presented a risk of significant harm to P, constitute a necessary and proportionate interference with P's Art 8 rights having regard to the terms of Art 8(2).

23. On behalf of P, Miss Swinscoe submits that s.33 of the Children Act 1989 would operate to allow the local authority to regulate P's use of her mobile phone in situations where P is co-operating. Miss Swinscoe points to the fact that whilst P wants to keep her mobile phone, she has been capable of agreeing that it is sensible to hand it to staff. Miss Swinscoe submits, however, that on the evidence before the court, the difficulty is when P becomes dysregulated and the local authority needs to restrict the use of her telephone against her refusal to co-operate in order to protect her safety, where there is clear evidence, Miss Swinscoe submits, that the use of the phone, and her other devices, by P can expose her to a risk of significant harm.

THE LAW

Art 5(1) and Deprivation of Liberty

24. The High Court may grant an order under its inherent jurisdiction authorising restrictions that constitute a deprivation of a child's liberty if (a) it is satisfied that those restrictions constitute a deprivation of liberty for the purposes of Art 5(1) of the ECHR and (b) it considers the deprivation of liberty to be in the child's best interests. As I have noted, in the context of the application made by the local authority in respect of P, the question arises as whether the restrictions sought in relation to P's mobile phone, tablet and laptop and her use of social media, constitute a deprivation of liberty for the purposes of Art 5(1).

25. Art 5(1) of the ECHR stipulates that everyone has the right to liberty and security of the person. The Article provides as follows in respect of that right to liberty and security of the person, and in respect of the lawful exceptions to the prohibition on deprivation of liberty:

> "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 is 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."

26. In considering the question of the meaning of deprivation of liberty under Art 5(1), s. 2(1) of the Human Rights Act 1998 requires that the court take into account relevant decisions of the European Court of Human Rights. In the context of examining the relationship between liberty and security of the person, the ECtHR has over the course of a number of decisions held that liberty must be understood in the context of *physical* liberty rather than physical safety and that the word 'security' in Art 5(1) serves simply to emphasis that the requirement that a person's liberty may not be deprived in an arbitrary fashion (*East African Asians v United Kingdom* (1973) Application No 4626/70). In this context, and historically, the concept of liberty under Art 5(1) of the ECHR contemplates individual liberty in its classic sense, that is to say the physical liberty of the person. In *Engel v Netherlands* (1976) 1 EHRR 647 at [58] this principle was expressed as follows:

> "In proclaiming the 'right to liberty', paragraph 1 of Article 5 is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (Art 2 of Protocol No 4). This is clear both from the use of the terms 'deprived of his liberty', 'arrest' and 'detention', which appear also in paras 2–5, and from a comparison between Article 5 and the other normative provisions of the Convention and its Protocols'). As such the 'security of the person' for the purposes of Art 5 of the ECHR will not be relevant, for example, in respect of applications relating to social security or insecure personal circumstances."

27. In the foregoing context, I note in passing that r 11(b) of the UN Rules for the Protection of Juveniles Deprived of their Liberty also emphasises the concept of *physical* liberty, providing the following definition of deprivation of liberty:

> "The deprivation of liberty means any form of detention or imprisonment or the placement of a person in another public or private setting from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority."

28. With respect to European authorities concerning the question of whether a person is deprived of their physical liberty, in *Guzzardi v Italy* the Commission reiterated at [92] that in proclaiming the right to liberty, Art 5(1) is contemplating the physical liberty of the person and held that the starting point for determining whether someone has been deprived of his liberty within the meaning of Art 5(1) must be his or her concrete situation, with account being taken of a whole range of criteria, such as the type, duration, effects and manner of implementation of the measure in question, the distinction between a deprivation of, and restriction upon, liberty being merely one of degree or intensity and not one of nature or substance.

29. As I have noted, in this case the local authority submits that the restrictions on P's mobile phone, tablet and laptop and the concomitant restriction on her access to social media, amount to a deprivation of liberty for the purposes of Art 5(1) when viewed in their proper context, namely as an essential *element* of the restrictive regime that deprives P of her liberty. As set out above, in *Guzzardi v Italy*, the European Commission of Human Rights considered that, in circumstances where the difference between deprivation of, and restriction upon, liberty is one of degree or intensity and not one of nature or substance, it is possible in an appropriate case to conclude that a deprivation of liberty results from the *manner* of implementation of the measure in question and that, whilst it might not be possible to conclude on the strength of one of the elements comprising the implementation of the measure that there has been a deprivation of liberty, it is possible that cumulatively and in combination the elements comprising the implementation of the measure will amount to a deprivation of liberty for the purposes of Art 5(1).

30. In *Guzzardi v Italy*, a case concerning the conditions of remand on the Italian island of Asinara of a suspected Mafioso, one of the elements of implementation that appears, in combination with others, to have grounded a finding that a deprivation of liberty for the purposes of Art 5(1) had occurred was the requirement on the applicant to "inform the supervisory authorities in advance of the telephone number and name of the person telephoned or telephoning each time he wished to make or receive a long-distance call" (the other conditions being, in summary, to reside in a prescribed locality on the island; not to leave that area without notifying the authorities; to report to authorities twice a day when requested to do so; to be law abiding and not give cause for suspicion; not to associate with convicted persons; to obey a curfew; not to carry arms and not to frequent bars or nightclubs or attend public meetings). It is further of note that the restriction regarding telephone use was to prevent contact with other alleged criminals during a period of remand and that the applicant was liable to punishment by arrest if he failed to comply with that obligation. As conceded by the local authority during oral submissions, *Guzzardi v Italy* thus involved very different facts to those that are before this court.

31. In *HL v United Kingdom* (2004) 40 EHRR 761, the ECtHR was concerned with a patient who was considered to be deprived of his liberty notwithstanding his apparent compliance. In determining whether there had been a deprivation of liberty for the purposes of Art 5(1), at [91] the court considered the question of whether the applicant "was under continuous supervision and control and was not free to leave." In concluding that the applicant fit this description, the court noted that the professionals caring for him "exercised complete and effective control over his care and movements."

32. The case of *Storck v Germany* (2006) 43 EHRR 6 concerned the placement of a minor in the care of a psychiatric institution by her father in 1974 and 1975, her further placement once an adult on a locked psychiatric ward in 1977, again at the request of her father, and her intermittent in patient admissions to psychiatric institutions thereafter up until 1993, after which an expert concluded that she had never suffered from a schizophrenic psychosis and that her excessive behaviour arose out of family conflicts. The ECtHR was required to decide whether applicant had been deprived of her liberty for the purposes of Art 5(1). The court began with the proposition, articulated in *Guzzardi v Italy* that the starting point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question, the distinction between a deprivation of, and restriction upon, liberty being merely one of degree or intensity and not one of nature or substance. The court articulated three components that must be present for their to have been a deprivation of liberty for the purposes of Art 5(1) of the Convention:

    i) An objective component of confinement in a particular restricted place for a not negligible length of time.

    ii) A subjective component of lack of valid consent.

    iii) The attribution of responsibility to the State.

33. In *Cheshire West and Chester v P* [2014] AC 896, the Supreme Court reviewed the European authorities, including *Engle v Netherlands*, *Guzzardi v Italy*, *HL v United Kingdom* and *Storck v Germany*. In *Cheshire West* the Supreme Court was concerned, *inter alia*, with two adolescents, P and Q, who were placed in foster care and specialist accommodation for adolescents respectively. The issue before the Supreme Court was whether those adolescents were deprived of their liberty for the purposes of Art 5(1).

34. Reflecting the position articulated in *Engel v Netherlands*, it is clear from the judgment of Baroness Hale that the Supreme Court proceeded on the basis that it is the concept of *physical* liberty that is protected by Art 5(1) (*Cheshire West and Chester v P* at [33] and [46]). At [46] Baroness Hale observed as follows:

> "Those rights include the right to physical liberty, which is guaranteed by article 5 of the European Convention. This is not a right to do or to go where one pleases. It is a more focused right, not to be deprived of that physical liberty. But, as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage."

35. The Supreme Court formulated a tripartite 'acid test'. Namely, (a) that the person is unable to consent to the deprivation of their liberty, (b) that the person is subject to continuous supervision and control and (c) that the person is not free to leave. Whilst

in *Cheshire West* at [49] Baroness Hale was not prepared to agree with the proposition that the 'continuous supervision and control' requirement is relevant *only* in so far as it demonstrates that the person is not free to leave, and that the second two elements of the test are separate components, in my judgment the question of continuous supervision and control informs the ultimate question of whether a person is deprived of their physical liberty, in the same way as the question of whether the person is free to leave informs that ultimate question.

36. The phrase "continuous supervision or control" used by the Supreme Court was drawn from the decision of the ECtHR in *HL v United Kingdom*. As I have set out, in that case, in considering whether the applicant was under constant supervision and control and not free to leave, the ECtHR placed emphasis on the fact that the professionals caring for him exercised complete and effective control over his care and movements. In *Cheshire West* at [51], Baroness Hale approved the reasoning of the judge in the case of P, whereby the judge had considered that the question of whether P was free to leave was informed by the question of continuous supervision or control:

> "In the case of *P* [2012] PTSR 1447, the Court of Appeal should not have set aside the decision of the judge for the reasons they gave. Does it follow that the decision of the judge should be restored? In my view it does. In para 46 of his judgment, he correctly directed himself as to the three components of a deprivation of liberty derived from Storck 43 EHRR 96; he reminded himself that the distinction between a deprivation of and a restriction of liberty is one of degree or intensity rather than nature or substance; and he held, at para 46(5), that:
>
> > 'A key factor is whether the person is, or is not, free to leave. This may be tested by determining whether those treating and managing the patient exercise complete and effective control of the person's care and movements.'"

37. Finally with respect to the relevant legal principles concerning the application of the ECHR, I pause to note that where restrictions on access to, or the use of, telephones fall to be considered under the provisions of the ECHR, they are most commonly considered in the context of the Art 8 right to respect for private and family life, rather than under Art 5(1). The concept of 'correspondence' under Art 8(1) will include private telephone calls (see *Halford v United Kingdom* (1997) 24 EHRR 523, paras 53–58 and see *A v France* (1993) 17 EHRR 462). In *Andersson v Sweden* (1992) 14 EHRR 615 the European Commission found that telephone conversations between a child and his or her parents for the purposes of contact constituted 'correspondence' for the purposes of Art 8(1). Surveillance likely to record conversations or communications may contravene Art 8(1) of the ECHR (See *Khan v United Kingdom* (2001) 31 EHRR 1016; *PG and JH v United Kingdom* (2008) 46 EHRR 51; *Taylor-Sabori v United Kingdom* (2003) 36 EHRR 248 and *Allan v United Kingdom* (2003) 36 EHRR 143). In order for an interference with Art 8(1) to be lawful, it must be justified by reference to Art 8(2) as in accordance with the law, serving a legitimate interest and being necessary in a democratic society.

Parental Responsibility

38. Section 3 of the Children Act 1989 defines the parental responsibility was follows:

"**3 Meaning of 'parental responsibility'**

(1) In this Act "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."

39. Where a child has been placed in the care of a local authority, as P has in this case, s.33 of the Children Act 1989 regulates the exercise by the local authority of the parental responsibility it shares under the auspices of the care order:

"**33 Effect of care order.**

(1) Where a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.

(2) Where—

(a) a care order has been made with respect to a child on the application of an authorised person; but

(b) the local authority designated by the order was not informed that that person proposed to make the application, the child may be kept in the care of that person until received into the care of the authority.

(3) While a care order is in force with respect to a child, the local authority designated by the order shall—

(a) have parental responsibility for the child; and

(b) have the power (subject to the following provisions of this section) to determine the extent to which —

(i) a parent, guardian or special guardian of the child; or

(ii) a person who by virtue of section 4A has parental responsibility for the child, may meet his parental responsibility for him.

(4) The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

(5) Nothing in subsection (3)(b) shall prevent a person mentioned in that provision who has care of the child] from doing what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting his welfare.

(6) While a care order is in force with respect to a child, the local authority designated by the order shall not—

> (a) cause the child to be brought up in any religious persuasion other than that in which he would have been brought up if the order had not been made; or
>
> (b) have the right—
>
> (i) [repealed]
>
> (ii) to agree or refuse to agree to the making of an adoption order, or an order under section 84 of the Adoption and Children Act 2002, with respect to the child; or
>
> (iii) to appoint a guardian for the child.
>
> (7) While a care order is in force with respect to a child, no person may—
>
> (a) cause the child to be known by a new surname; or
>
> (b) remove him from the United Kingdom, without either the written consent of every person who has parental responsibility for the child or the leave of the court.
>
> (8) Subsection (7)(b) does not—
>
> (a) prevent the removal of such a child, for a period of less than one month, by the authority in whose care he is; or
>
> (b) apply to arrangements for such a child to live outside England and Wales (which are governed by paragraph 19 of Schedule 2 in England, and section 124 of the Social Services and Well-being (Wales) Act 2014 in Wales).
>
> (9) The power in subsection (3)(b) is subject (in addition to being subject to the provisions of this section) to any right, duty, power, responsibility or authority which [F6a person mentioned in that provision] has in relation to the child and his property by virtue of any other enactment."

40. By s.22(3)(a) of the Children Act 1989, the exercise by the local authority of its parental responsibility under s.33(3)(b) is subject to its general duty in relation to a child who it is looking after, namely, to safeguard and promote his or her welfare. By s.22(4) of the 1989 Act, before making any decision with respect to a looked-after child, the local authority must, so far as is reasonably practicable, ascertain the wishes and feelings of the child and his parents regarding the matter to be decided. By s.33(4) of the 1989 Act, the local authority may not exercise its overriding parental responsibility unless it is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare. Within this context, in *Re T (A Child)* [2021] UKSC 3 at [118], Lady Black observed as follows with respect to the relationship between s.33 of the Children Act 1989 and the inherent jurisdiction:

> "[118] It should be possible, now, to see how section 100(2) is moulded to the effects of a care order detailed in the provisions to which I have just referred. Having started with prohibiting the use of the inherent jurisdiction to place the child in local authority care or under their supervision, it then

> prevents the court using the inherent jurisdiction to order the accommodation of a child by a local authority, and, of course, prevents it being used to put the local authority in a position to determine any question in connection with parental responsibility. This seems to me to be entirely consistent with the aim being to confine matters to the statutory scheme in Part IV of the Children Act 1989, the thinking being that a local authority needing the power to determine any question in connection with parental responsibility must seek it through the medium of a care order. For the most part, the care order would clothe the local authority with the required parental responsibility and, in so far as the local authority was aiming at an element of parental responsibility which receives special treatment in section 33, section 33 itself would dictate whether the limit on the local authority's parental responsibility was absolute (see section 33(6), for example, which prohibits a local authority from causing a child to be brought up in a different religious persuasion) or qualified (for example, section 33(7) provides that no person shall cause the child to be known by a new surname except with the written consent of every person with parental responsibility or leave of the court)."

Inherent Jurisdiction

41. Lady Black made clear in *Re T* at [119] that it was not intended by the Children Act 1989 to make the inherent jurisdiction entirely unavailable to local authorities, in circumstances where there would remain cases where it was necessary to resort to it because there was reason to believe that the child would otherwise be likely to suffer significant harm. In this regard, s.100 of the Children Act 1989 provides as follows:

> "**100 Restrictions on use of wardship jurisdiction**
>
> (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;
>
> (c) so as to make a child who is the subject of a care order a ward of court; or
>
> (d) 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 wish 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)."

42. In *Re H (A Child)(Parental Responsibility: Vaccination)* [2020] EWCA Civ 664, the Court of Appeal recognised that, whilst a strict reading of s.33(3)(b) suggests that the extent to which a local authority may exercise its parental responsibility under that section is unlimited, provided that it is acting in order to safeguard or promote the welfare of the child, as a matter of practice local authorities and the courts have for many years been acutely aware that some decisions are of such magnitude that it would be wrong for a local authority to use its power under s.33(3)(b) of the Children Act 1989 to override the wishes or views of a parent without sanction by the court.

43. The Court of Appeal in *Re H (A Child)(Parental Responsibility: Vaccination)* further noted that, whilst the category of cases in which the court may be asked to intercede notwithstanding that the local authority could, in principle, exercise its powers under s.33(3)(b) of the 1989 Act are not closed, they will chiefly concern decisions with profound and enduring consequences for a child. This point is reinforced by the fact that s.100(4) of the Children Act 1989 means that a local authority can *only* have recourse to the inherent jurisdiction where it can be demonstrated that there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child, he or she is likely to suffer significant harm (see *Re C (Children)* [2017] Fam 137).

DISCUSSION

44. In my judgment, it is *not* appropriate for the court to authorise the removal of, or the restriction of the use of P's mobile phone, tablet and laptop and her access to social media in an order authorising the deprivation of her liberty for the purposes of Art 5(1) of the ECHR. I am further satisfied that the appropriate legal framework in this case for mediating the removal of, or the restriction of the use of, P's mobile phone, tablet and laptop and use of social media is that provided to the local authority by s.33(3)(b) of the Children Act 1989. Finally, whilst I am satisfied that, were the evidence to justify it, it would be open to the local authority to apply for an order under the inherent jurisdiction authorising the use of restraint or other force in order remove P's mobile phone, tablet and laptop from her if she refused to surrender them to confiscation, I am satisfied that such an order is not at present justified on the evidence in this case. My reasons for so deciding are as follows.

45. I recognise that for P, in common with many other young people of her age, her mobile phone and other devices constitute a powerful analogue for freedom, particularly in circumstances where she is at present confined physically to her placement. Within this context, I accept that the possession and use of her mobile phone, tablet and laptop, and her concomitant access to social media, is likely to equate in P's mind to "liberty" broadly defined as the state or condition of being free. However, this court is concerned with the meaning of liberty under Art 5(1) of the ECHR. Whilst I recognise that the Convention is a living instrument, which must be interpreted in the light of present-day conditions (see *Tyrer v United Kingdom* (1978) 2 EHRR 1 at [31]), over an extended period of time the Commission and the ECtHR have repeatedly made clear that Art 5(1) is concerned with individual liberty in its classic sense of the *physical* liberty of the person, with its aim being to ensure that no one is dispossessed of their physical liberty in an arbitrary fashion. The Supreme Court proceeded on that formulation of the proper scope of Art 5(1) in *Cheshire West*.

46. Within the foregoing context, in my judgment the removal of, or the placing of restrictions on the use of, P's mobile phone, tablet and laptop and her use of social media do not by themselves amount to a restriction of her liberty for the purposes of Art 5(1). On the evidence currently before the court those restrictions do not act to deprive P of her physical liberty, but rather act to restrict her communication, so as to ensure her physical and emotional safety. The evidence set out earlier in this judgment demonstrates that the effect of those restrictions is to limit P's communications with peers who might encourage her to engage in bad behaviour, with strangers who may present a risk to her and with family and friends when she is in a heightened emotional state. Within this context, the restrictions on the use of P's devices for which the local authority seek authorisation do not, in my judgment, by themselves constitute an objective component of confinement of P in a particular restricted place for a not negligible length of time. In the circumstances, whilst they are steps at times taken without P's consent and are imputable to the State, those restrictions do not, by themselves, meet the first *Storck* criterion.

47. I accept that, in line with the authorities cited above, the determination of whether there is a deprivation of liberty falls to be made on a whole range of factors, such as the type, duration, effects and manner of implementation of the measure in question, and that the distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance. In this context, I have given careful thought to the submission of the local authority that, whilst the restrictions imposed on P in respect of her mobile phone, tablet and laptop and on the use of social media do not, *in themselves*, meet the first *Storck* criterion, it nonetheless remains open to the court to authorise them in an order authorising the deprivation of her liberty because those steps are an integral *element* of the deprivation of P's liberty. I am not, however, persuaded by that argument, again having regard to the evidence before the court.

48. Whilst the removal of, and the restrictions on the use of, P's mobile phone, tablet and laptop and on the use of social media might be said, at least at times, to form part of a regime of continuous supervision and control in her placement and that she is not free to leave, once again those measures do not act to restrict P's *physical* liberty. The effect of those restrictions is to prevent P broadcasting online indiscriminately, to prevent contact from those advising her how to frustrate steps the placement takes to stop her

from harming herself and others and to prevent her sharing details online with those who may pose a risk to her and restricting contact with those against whom she has alleged abuse. There is no suggestion in the evidence currently before the court that those restrictions constitute a necessary element of the deprivation of P's *physical* liberty or of the manner of implementation of that deprivation of liberty. For example, the evidence before the court does not suggest that the restrictions on the use of P's mobile phone, tablet and laptop and use of social media are required to ensure the effectiveness of the current measures that do operate to prevent her from leaving the placement, or that without those restrictions the current measures that operate to prevent her from leaving the placement would be rendered ineffective. In these circumstances, in my judgment the restrictions in respect of P's phone, tablet and laptop and on the use of social media do not, even when considered in the context of the other elements of the other restrictions for which authorisation is sought, constitute an objective component of confinement of P in a particular restricted place for a not negligible length of time. Accordingly, it would in my judgment be wrong to authorise them under the auspices of a DOLS order simply because they form part of the total regime to which P is currently subject in her placement.

49. I accept, *per* the decision in *Guzzardi v Italy*, that in an appropriate case it is possible to be satisfied that individual measures imposed on a child, when considered cumulatively and in combination, can amount to a deprivation of liberty for the purposes of Art 5(1), even if those elements do not have that effect when viewed individually. I further accept that in *Cheshire West*, the proposition that continuous supervision and control is relevant only in so far as it demonstrates that the person is not free to leave was rejected by Baroness Hale. In my judgment however, if the court is to authorise an element of supervision or control on the basis that it constitutes, either in whole or as part of the whole, a deprivation of liberty for the purposes of Art 5(1), there must be at least *some* evidential basis for concluding that that element of supervision and control constitutes an objective component of confinement in a particular restricted place for a not negligible length of time. Otherwise, the court would be able to authorise by reference to Art 5(1) any and all measures in the package of care provided to P in placement, even if they had nothing to do with restricting her physical liberty. This would be an undesirable outcome.

50. The difference between deprivation of and restriction upon liberty is one of degree or intensity and not one of nature or substance. But there is nonetheless a difference and that difference can have consequences. As I have noted above, restrictions of the type being imposed on P with respect to the use of her mobile phone, tablet and laptop, and concomitant limitations on her access to social media, are most naturally characterised as an interference with her Art 8 right to respect for private and family life. When considering them as such, before a court could endorse that interference it would have to be satisfied that that interference was necessary and proportionate, pursuant to Art 8(2). If however, those steps were instead to be considered and endorsed by the court by reference to Art 5(1), the exercise under Art 8(2) would be bypassed in respect of steps that constitute an interference in an Art 8(1) right. It is important that the court be careful not to allow its jurisdiction to make orders authorising the deprivation of a child's liberty by reference to Art 5(1) to spill over into authorising steps that do not constitute a deprivation of liberty for the purposes of Art 5(1), particularly where those steps might constitute breaches of different rights, which breaches fall to be evaluated under different criteria. It may well be that one of the reasons for ECtHR adopting the

narrow interpretation of word 'liberty' under Art 5(1) in cases such *as Engel v Netherlands*, limiting it to the classic concept of physical liberty, was to reduce risk of the Art 5 exceptions resulting in a *de facto* interference with other rights, without proper reference to the content of those other rights.

51. For these reasons, I do not consider it appropriate to grant, as part of the application for an order under the inherent jurisdiction authorising the deprivation of P's liberty, the authorisations sought by the local authority concerning P's mobile phone, tablet and laptop and her access to social media. Those are not in my judgment appropriate declarations to make in this case under the court's inherent jurisdiction to authorise restrictions that constitute deprivations of liberty for the purposes of Art 5(1). As conceded by the local authority, I am satisfied that this case can be distinguished clearly from the case of *Guzzardi v Italy*.

52. This, of course, leaves the question of under what legal framework could the restrictions on the use of P's mobile phone, tablet and laptop and the use of social media that the professionals caring for P contend are necessary to keep her safe be implemented. In my judgement, the appropriate legal framework is that provided by s.33(3)(b) of the Children Act 1989.

53. P is the subject of a final care order. Within this context, pursuant to s.33(3)(b) of the 1989 Act, the local authority is able to determine the extent to which P's parents may meet their parental responsibility for her. In such circumstances, if P's parents were to take an opposing view regarding the restriction or removal of P's mobile phone, table and laptop and access to social media to that which the local authority considers necessary to safeguard and promote her welfare, the local authority is able to exercise parental responsibility in their place, unless the steps it wished to take are of such magnitude that they should not be taken without sanction by the court. As I have noted above, during her submissions Ms Whelan raised this latter concern in circumstances where P is now 16 years old and the removal or restriction of her mobile phone, tablet, laptop and access to social media would be being undertaken in the context of her strongly expressed views.

54. It cannot be open to serious dispute that, having regard to the definition of parental responsibility under s.3 of the Children Act 1989, the control, regulation and supervision of the use by a child or young person of their mobile phone will constitute an exercise of parental responsibility, being for parents in the modern age one of the "innumerable, often mundane, decisions to be made on behalf of that child on a daily, if not hourly, basis" (see *Re H (A Child)(Parental Responsibility: Vaccination)* at [16]). The extent to which a parent will be required to control, regulate and supervise the use of their child's phone will, of course, change as the child gets older. 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. As a child gets older, decisions taken in the exercise of parental responsibility will increasingly give way to decisions taken by the child autonomously.

55. However, even for a young person aged 16, it would not be unreasonable in my view for a parent who has become aware that the use by their 16 year old child of his or her mobile phone is placing them at risk of significant harm, for example through child sexual exploitation (because it is apparent that they are being groomed online), or

through self harm (because it is apparent that they are watching self harm content on social media), or through criminal prosecution for selling drugs (because it is apparent they are in contact with an OCG), to seek to address that situation by removing or restricting the use of their teenager's mobile phone and other devices in the exercise of their parental responsibility. In circumstances where the use of a mobile phone, tablet or laptop becomes a source of significant harm to the child, it is surely a proper exercise of parental responsibility for a parent to seek to protect that child by removing by way of confiscation, or restricting the use of, such devices as a means of protecting the child from exploitation, harm or abuse, even where that child is an adolescent, and in particular where that child is a vulnerable adolescent who may well be less mature and less capable of making autonomous decisions on these matters. Restrictions short of confiscating the phone might take the form of refusing to pay the bill for the phone or for top-ups or switching off or otherwise restricting access to Wi-Fi.

56. In these circumstances, in my judgment, a decision by the local authority in the exercise of its shared parental responsibility under s.33(3)(b) of the Children Act 1989 to confiscate P's mobile phone or other device where she would otherwise be at risk of significant harm is a relatively uncontroversial exercise of parental responsibility, even in circumstances where P is 16 years old. It is *not* one that in my judgment constitutes a step of such magnitude that it requires recourse to the court before the local authority could take such steps using its powers under s.33(3)(b) of the Children Act 1989. The same is true in my judgment of a decision by a local authority in the exercise of parental responsibility under s33(3)(b) to supervise or place restrictions on the use of P's phone short of confiscation by, for example, refusing to pay the bill for that mobile phone or to provide top-up payments or to restrict or prevent access to Wi-Fi.

57. It is clear from the evidence before the court that P is a young person with complex emotional difficulties and that she is functioning below her chronological age of 16 years. Whilst in a heightened state, P has displayed serious self-harming behaviours including making threats to her own life. In addition to these behaviours P has also, again when in a heightened state, used the threat of violence towards others, including her family, peers and staff that are assigned to supervise her. The evidence before the court demonstrates that these difficulties can be further exacerbated by the use by P of her mobile phone, tablet and laptop and by access to social media. During those periods she can be enticed through these means to resist measures designed to keep her safe, to act out in terms of behaviour and to seek to undermine relationships with those caring for her. Against these matters however, whilst something she strongly dislikes, the removal or restriction of P's mobile phone, tablet and laptop and access to social media, whether by way of confiscation of those devices or by a to provide top-up payments or by the restriction of Wi-Fi would not in my judgment itself be harmful to P. Further, in so far as such steps constitute an interference in P's Art 8(1) right to respect for private and family life, provided they are being taken on the basis of evidence and in response to the need to avoid harm presented by the use of, or the unrestricted use of the devices, they are likely to be a necessary and proportionate for the purposes of Art 8(2).

58. In the circumstances, I can see no principled objection to the local authority seeking to remove or restrict the use of P's mobile phone, tablet and laptop and use of social media under the powers conferred on it by s.33(3)(b) of the Children Act 1989, provided it is necessary to do so in order to safeguard and promote P's welfare. I consider that in

such circumstances, the local authority would be acting lawfully under the power conferred in it by s.33(3)(b) of the Children Act 1989 were it to confiscate P's phone, tablet or laptop in the face of her objection. Likewise, in such circumstances I consider that the local authority would be acting lawfully pursuant to its powers under s.33(3)(b) of the Children Act 1989, if took other steps to restrict or monitor the use by P of her phone, tablet, laptop or of social media, including refusing to fund top-ups, refusing to pay the bill for the phone and turning off or restricting the Wi-Fi in the face of her objection.

59. During her submissions, Ms Whelan contended that on the evidence currently before the court there *may* be circumstances where an order under the inherent jurisdiction is required to authorise restrictions with respect P's mobile phone, tablet and laptop and use of social media, notwithstanding s.33(3)(b) of the Children Act 1989. Ms Whelan pointed to the fact that P can become physically aggressive to the point where she needs to be restrained for her own safety and can refuse to co-operate with those caring for her. In such circumstances, Ms Whelan submitted that those caring for P might be required to use physical restraint or other force in order to confiscate her phone or other device from her, which would take the steps required outside the proper ambit of s.33(3)(b) of the 1989 Act.

60. I accept that circumstances that contemplate the use of physical restraint or other force to remove a mobile phone or other device from a 16 year old adolescent, even in order to prevent significant harm, is a grave step that would require sanction by the court, rather than simply the exercise by the local authority of its power under s.33(3)(b) of the 1989 Act, not least because such actions would likely constitute an assault. I am further satisfied that, in an appropriate case and where an order under Part II of the Children Act 1989 would not be available where a child is subject to a final care order, it would be open to the court to grant the local authority permission to apply for an order under the inherent jurisdiction, separate to any order authorising deprivation of liberty, that declares lawful the steps required to effect by restraint or other reasonable force the removal from a child of his or her devices, provided it is demonstrated that their continued use is causing, or risks causing, significant harm and provided that the force or restraint used is the minimum degree of force or restraint required.

61. As noted by Sir Andrew McFarlane P in the Court of Appeal in *Re T (A Child)* [2018] EWCA Civ 2136, in a passage cited with approval by Lady Black on appeal to the Supreme Court in *Re T (A Child)*, a primary justification for the continued use of the inherent jurisdiction with respect to children in modern times is to provide protection for young people when their welfare demands it. In *Re T*, Lady Black, who later in her judgment at [113] referred to "the time-honoured role that the inherent jurisdiction plays in protecting children whose welfare requires it", further noted the following passage from the judgment of Lord Eldon LC in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 18 in the context of an application to place the children under the protection of the Court:

> "… it has always been the principle of this Court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done."

62. The threshold for making an *order* on the application of the local authority that authorised the use of force or restraint to effect the removal from a child of his or her

devices is necessarily a high one, given the terms of s.100(4)(b) of the Children Act 1989. It would not be open to the court to make such order on the application of the local authority authorising removal of a phone by restraint or other force unless it could be demonstrated, pursuant to s.100(4)(b) of the Act, that there was reasonable cause to believe that if the court's inherent jurisdiction was not exercised with respect to the child, he or she would likely suffer significant harm. Self evidently, such a threshold will be hard to meet where it can be demonstrated that the necessary steps in relation to the child's phone or other devices required to safeguard and promote the child's welfare can by taken effectively by the local authority in the exercise of its shared parental responsibility under s.33(3)(b) of the Children Act 1989. In this case, at present, I am satisfied that this is the position in respect of P.

63. I accept that there is some evidence before the court that P can, on occasion, be non-compliant and has on two occasions refused to surrender her mobile phone. I also accept that there is evidence that when in a heightened state P can be aggressive and violent. She can be impulsive, can at times not think of consequences and can exhibit poor control over her emotions and find it difficult to trust adults. However, against this there is also significant evidence demonstrating that P has, to date, largely co-operated with requests made by those caring for her to surrender her phone, tablet and laptop when asked and to comply with requests to inspect that phone. The evidence further demonstrates a degree of understanding on the part of P as to why these steps are necessary. In this context, P has willingly participated in work designed to increase her safety online and her understanding of the risks presented by people she does not know. As I have already concluded, it is open to the local authority pursuant to its powers under s.33(3)(b) of the Children Act 1989 to confiscate P's phone in the face of her objection where the local authority considers such a step necessary to safeguard and promote P's welfare. Likewise, it is open to the local authority, pursuant to its powers under s.33(3)(b) of the Children Act 1989, to take other steps to restrict or monitor the use by P of her mobile phone, tablet and laptop and social media, including refusing to fund top-ups, refusing to pay the bill for the phone and turning off or restricting the Wi-Fi in the face of her objection, again where the local authority considers such a step necessary to safeguard and promote P's welfare.

64. In the circumstances set out in the foregoing paragraph, I am not satisfied on the current evidence that it can currently be said that P will be likely to suffer significant harm if an order under the inherent jurisdiction is not made authorising the use of restraint or other force to compel P to hand over her devices. In the circumstances, s.100(4)(b) of the 1989 Act cannot at present be satisfied and it is not open to the court to make an order under the inherent jurisdiction. Whilst Ms Whelan sought to argue that such an order *might* be needed in the future, were P's current co-operation to deteriorate in the manner it has done so in the past, unless the evidence before the court demonstrates that P is likely to suffer significant harm referrable to her use of her phone, tablet and laptop and social media if an order under the inherent jurisdiction is not made, the court has no jurisdiction to make such an anticipatory order by reason of s.100(4) of the 1989 Act.

65. Finally, I am satisfied that the other restrictions sought by the local authority (up to 3:1 supervision at all times, the use of control and physical restraint to protect from physical harm within the placement and the wider community, regular supervision and observation in order to prevent self-harm, access by staff to her bathroom, restriction

of access to kitchen and staff room and escort when moving around the placement and wider community), *do* constitute a deprivation of P's liberty for the purposes of Art 5(1) and that, on the evidence before the court, it is in P's best interests to authorise that deprivation of liberty.

66. As set out above, P's current placement is not registered with Ofsted but is registered with the CQC. It is clear that registration with the CQC will *not* be sufficient also to fulfil the registration requirements under s.1(2) of the Care Standards Act 2000 if, in addition to providing regulated activities as defined in Schedule 1 of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, the placement also constitutes a children's home for the purposes of s.1(2) of the Care Standards Act 2000. In such circumstances, if a placement has obtained CQC registration, this will not absolve it from having to apply for, and obtain, Ofsted registration *if* that placement also constitutes a children's home under s.1(2) of the 2000 Act, such registration being legal a requirement. Further, where a placement that is registered as a health care provision with the CQC is also a children's home under s.1(2) of the Care Standards Act 2000 but is not registered with Ofsted, the requirements set out in the current President's Guidance concerning the need to apply to Ofsted for the appropriate registration will continue to apply.

67. In the circumstances, the central question in determining whether P's current placement is unregistered (and hence unlawful by reference to the terms of the Care Planning, Placement and Case Review (England) Regulations 2010 as amended) or unregulated (i.e. a placement that is not a children's home for the purposes of s.1(2) of the Care Standards Act 2000 and therefore does not require to be registered under the terms of the 2000 Act), is whether the placement is operating as a children's home for the purposes of s.1(2) of the Care Standards Act 2000.

68. In this case, an enquiry has been made by the local authority with Ofsted and a decision invited as to whether P's placement falls within the definition of a children's home and, therefore, requires registration. Confirmation from Ofsted is awaited but, as noted above, on 9 December 2022, Ofsted wrote to PT to confirm that another of their placements registered with the CQC, which the local authority asserts is almost identical to the provision now being provided by PT to P, does not meet the definition of a children's home under the Care Standards Act 2000, and accordingly does not constitute the operation of an unregistered children's home. Within this context, I am satisfied that the outstanding query does not act to prevent the court from granting the order in respect of the other restrictions sought by the local authority that the court is satisfied constitute a deprivation of liberty for the purposes of Art 5(1) and that it is in P's best interests to authorise. If Ofsted considers that the placement does, in fact, constitute a children's home, the matter will need to be returned to court by the local authority.

CONCLUSION

69. In the circumstances, and for the reasons I have given, I refuse to sanction the removal of, or the restriction of the use of P's mobile phone, tablet and laptop and her access to social media by way of an order authorising the deprivation of her liberty for the purposes of Art 5(1) of the ECHR. I shall instead, make a declaration that it is lawful for the local authority to impose such restrictions in this regard as are recorded in the order in the exercise of the power conferred on it by s.33(3)(b) of the Children Act

1989. Whilst I am satisfied that, were the evidence to justify it, it would be open to the court to grant an order under its inherent jurisdiction authorising the use of restraint or other force in order remove P's mobile phone, tablet and laptop from her if she refused to surrender them to confiscation, the evidence currently before the court does not justify such an order being made. Finally, I am satisfied that the other restrictions sought by the local authority do constitute a deprivation of liberty for the purposes of Art 5(1) and that it is in P's best interests to authorise that deprivation of liberty. I shall make an order in the terms of the order appended to this judgment.

70. Dicey considered the right to liberty to be one of the general principles of the Constitution (see Dicey, A V An Introduction to the Study of the Law of the Constitution (1885) 9th edn, MacMillan 1945, p 19). In *R v Secretary of State for the Home Department ex p Cheblak* [1991] 1 WLR 890, Lord Donaldson observed that "We have all been brought up to believe, and do believe, that the liberty of the citizen under the law is the most fundamental of all freedoms." Within this context, it essential that the State adhere to the rule of law when acting to deprive a child of his or her liberty. This will extend to ensuring that an order lawfully depriving a child of his or her liberty does not act also to deprive that child of other cardinal rights without there being in place proper justification for such interference by reference to the specific content of those other rights.

71. Each case will fall to be determined on its own facts. However, I venture to suggest that it will *not* ordinarily be appropriate to authorise restrictions on phones and other electronic devices within a DOLS order authorising the deprivation of the child's liberty. Further, it is to be anticipated that, in very many cases, any restrictions on the use of phones and other devices that are required to safeguard and promote the child's welfare will fall properly to be dealt with by the local authority under the power conferred on it by s.33(3)(b) of the Children Act 1989. Only in a small number of cases should it be necessary to have recourse to an order under the inherent jurisdiction, separate from the order authorising the deprivation of liberty, authorising more draconian steps to restrict the child's use of a mobile phone or other device and only then where there is cogent evidence that the child is likely to suffer significant harm if an order under the inherent jurisdiction in that regard were not to be made.

72. That is my judgment.

SCHEDULE

In the High Court of Justice **No: MA22P01360**

Family Division

Manchester District Registry

The Senior Courts Act 1981

The child: P (A Girl) DOB January 2007

ORDER

BEFORE Mr Justice MacDonald sitting in private at the Manchester District Registry

The parties and representation at this hearing

The applicant is Manchester City Council.

The first respondent is CP, the mother, who was not present or represented.

The second respondent is DT, the father, not present or represented.

The third respondent is the child acting by her Children's Guardian.

RECITALS

UPON the mother, who is unrepresented, being unable to be present for the purpose of the hearing but her position being recorded on the face of the order of 16 January 2023.

AND UPON the father not being present or represented today.

AND UPON the court considering the documents relevant for today's hearing and hearing submissions from the local authority and guardian to supplement the skeleton arguments filed.

AND UPON the Court reserving judgment.

AND UPON the local authority confirming that the restrictions constituting a deprivation of liberty that are authorised by this order will only be implemented where it is necessary and proportionate to safeguard the child and they will be reviewed on a regular basis.

AND UPON the court being further satisfied that the restrictions to the child liberty at FW (hereafter "the identified placement") and the placement operated by PT are in the best interests of the child and are necessary and proportionate to ensure her safety and ongoing welfare.

AND UPON the local authority agreeing to convene a deprivation of liberty review every 6 weeks, the minutes will be circulated to the parents.

AND UPON the court determining that it is not appropriate to sanction the restriction of the use of P's mobile phone, tablet and laptop and her access to social media by way of an order authorising the deprivation of her liberty for the purposes of Art 5(1) of the ECHR but making a declaration that it is lawful for the local authority to impose such restrictions in this regard as are recorded in this order in the exercise of the power conferred on it by s.33(3)(b) of the Children Act 1989.

IT IS DECLARED THAT:

1. The child, P, is being deprived of her liberty and is unable to consent to the same.

2. It is lawful and in the best interest of P that the local authority is permitted to deprive P of her liberty at FW. Such deprivation of liberty is authorised until **4pm on 20 January 2023.** This authorisation shall take effect immediately.

3. It is lawful and in the best interest of P that the local authority is permitted to deprive P of her liberty at PT. Such deprivation of liberty is authorised until **16.00 on 25 July 2023.** This authorisation shall take effect immediately.

4. The deprivation of liberty sought by the local authority and permitted by the court is necessary to avoid breaching the subject child's Art 2 and Art 3 rights and is the least restrictive and is a proportionate response to the risk of harm which arise. Such restrictions may include:

    a. Up to 4:1 supervision whilst she is in placement at FW.

    b. Up to 3:1 supervision at all times when in placement at PT.

    c. Use of physical restraint to protect P from physical harm.

    d. Regular supervision and observations in order to mitigate the risk of P using items to self-harm, the level of supervision and observations to be determined by the placement staff in response to P's presentation and associated level of risk.

    e. The removal of items identified to pose a risk to P in being used for the purpose of self-harm or otherwise causing harm to others, subject to any items removed being recorded with reasons for the removal identified.

    f. Access by placement staff to any bathroom area where P is located, where there are reasonable grounds to believe that P is at immediate risk of suffering significant harm.

    g. The supervision and/or escorting of P where appropriate, by up to three members of the placement staff for the purpose of maintaining P's safety within the around the residential placement and in the wider community.

    h. The restriction of P's access to the kitchen and staff room by means of key fob entry.

i. The use of control and restraint techniques as are considered to be necessary, proportionate and the least restrictive for the purpose of preventing P from harming herself or others within the residential placement or in such other situations as is necessary, by placement staff with the relevant and appropriate training.

j. The use of control and restraint techniques as are considered to be necessary, proportionate and the least restrictive for the purpose of preventing P from harming herself or others during the course of P having access to the wider community by placement staff with the relevant appropriate training.

5. In depriving the child of her liberty, the local authority is directed to use the minimum degree of force or restraint required. The use of such force/restraint is lawful and in their best interests provided always that the measures are:

a. The least restrictive of the child's rights and freedoms.

b. Proportionate to the anticipated harm.

c. The least required to ensure the child's safety and that of others.

d. Respectful of the child's dignity.

AND IT IS FURTHER DECLARED THAT

6. It is lawful for the local authority, if necessary, to take any or all of the following steps with respect to the use by P of her phone, tablet or laptop in the exercise of the power conferred on it by s.33(3)(b) of the Children Act 1989 until 16.00 on 25 July 2023:

a. To be prevented from having access to the house phone.

b. To be supervised when making calls to friends and her peers on her mobile phone to enable such calls logged and reported to the social worker.

c. To be required permit staff to check her mobile telephone and / or any other internet enabled device in order that concerning content can be logged and reported to the social worker.

d. Where P becomes emotionally dysregulated, to be prevented from having access to social media.

e. Not to be provided with a top-up payment for her mobile phone where required to control P's access to social media when emotionally dysregulated.

f. To be restricted to the use of Wi-Fi where required to control P's access to social media when emotionally dysregulated.

g. To be prohibited from taking her mobile phone to the bathroom.

h. For staff to have access to her mobile phone where P takes video recordings of staff, in order to delete those videos.

AND IT IS ORDERED THAT:

7. Pursuant to s.100 of the Children Act 1989, leave is granted to the local authority to invoke the inherent jurisdiction with respect to the authorisation of restrictions constituting a deprivation of liberty for the purposes of Art 5(1) of the ECHR.

8. The local authority is permitted to provide a copy of this order to the placements.

9. If any change to the care or living arrangements are proposed which would render it more restrictive the local authority shall apply to the court for review of this order before any such changes are made.

10. If there is any significant change, whether deterioration or improvement, in the child's condition or if alternative placement is identified the local authority shall apply to the court for review of this order

11. The matter is listed before Mr Justice MacDonald at 10am on Wednesday 25 July 2023 at 10.00am at the Royal Courts of Justice, Strand, London, WC2A 2LL for review.

12. No order as to costs.