Neutral Citation Number: [2019] EWCA Civ 2025

Case No: B4/2019/1649

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LEEDS
HH Judge Hayes QC
LS19C00069

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 November 2019

Before :

LORD JUSTICE FLOYD
LORD JUSTICE BAKER
and
LORD JUSTICE GREEN

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF B (SECURE ACCOMMODATION ORDER)

Between :

A LOCAL AUTHORITY	**Appellant**
- and -	
B'S MOTHER (1)	**Respondent**
B'S FATHER (2)	
B'S STEP-FATHER (3)	
B (by her children's guardian) (4)	
-and-	
The Association of Lawyers for Children	
	Intervenors

- -
- -

Frank Feehan QC and Brett Davies (instructed by **John Crosse, Community Law Manager**) for the **Appellant**
The First and Third Respondent appeared in person
Lisa Phillips (instructed by **Switalskis**) for the **Fourth Respondent**
Lorraine Cavanagh QC, Denise Gilling and Baljinder Bath (instructed by ITN Solicitors) for the **intervenors**
The Second Respondent was not present or represented.

Hearing date: 10 September 2019

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Approved Judgment

This judgment was delivered in public but it is ordered that in any published version of the judgment no person other than the advocates or the solicitors instructing them and other persons named in this version of the judgment shall be identified by name or location and that in particular the anonymity of the child and members of her family must be strictly preserved.

LORD JUSTICE BAKER :

Introduction

1. This is an appeal by a local authority against an order made by HH Judge Hayes QC refusing the authority's application for a secure accommodation order under s.25 of the Children Act 1989 in respect of a 15-year-old girl hereafter referred to as "B".

2. The appeal raises four important and overlapping questions on the interpretation of s.25.

    (1) What is the meaning of "secure accommodation" in s.25?

    (2) What are the relevant criteria for making a secure accommodation order under s.25?

    (3) What part does the evaluation of welfare play in the court's decision?

    (4) When considering an application for an order under s.25, is the court obliged, under Articles 5 and 8 of the ECHR, to carry out an evaluation of proportionality?

3. Over the 28 years since the implementation of the Children Act, there have been a number of reported authorities, at first instance and in this court, on s.25 and on the parallel powers to authorise the deprivation of a child's liberty under the inherent jurisdiction of the High Court. Until very recently, the section has never been considered by the Supreme Court or its predecessor, the Appellate Committee of the House of Lords. After the hearing of the present appeal, and while this judgment was under construction, the Supreme Court handed down its judgments in *Re D (A Child)* [2019] UKSC 42 in which Lady Black made a number of important observations about s.25 addressing the first and, to some extent, the third questions listed in paragraph 2 above. As I read her judgment, those observations are obiter, and indeed she is at pains to emphasise the views she expresses are only provisional. Nevertheless, her comments are plainly made after considerable deliberation, and merit the greatest respect.

4. The context in which this appeal is being considered is what can fairly be described as the crisis in the provision of secure accommodation in England and Wales. This was the subject of comment and expressions of concern by this court last year in the decision in *Re T (A Child) (ALC Intervening)* [2018] EWCA Civ 2136. In preliminary remarks at the beginning of his judgment, Sir Andrew McFarlane P observed:

> "2. …. This court understands that, in recent years, there has been a growing disparity between the number of approved secure children's homes and the greater number of young people who require secure accommodation. As the statutory scheme permits of no exceptions in this regard, where an appropriate secure placement is on offer in the unit which is either not a children's home, or is a children's home that has not been approved for secure accommodation, the relevant local authority has sought approval by an application under the inherent jurisdiction asking for the court's permission to restrict the

> liberty of the young person concerned under the terms of the regime of the particular unit on offer.
>
> ….
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> 5. It is plainly a matter for concern that so many applications are being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. The concern is not so much because of the pressure that this places on the court system, or the fact that local authorities have to engage in a more costly court process; the concern is that young people are being placed in units which, by definition, have not been approved as secure placements by the Secretary of State where that approval has been stipulated as a pre-condition by Parliament.
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> 6. In the present appeal, no party takes issue with the use of the inherent jurisdiction to meet the needs of the group of vulnerable young people, who would otherwise be the subject of a Children Act 1989 s.25 secure accommodation order, but who fall outside the statutory scheme solely as a result of the lack of available approved secure children's homes. Indeed, as 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 where their welfare demands it, it would be difficult to argue against the assumption of jurisdiction in such cases …."

5. In the 12 months since ***Re T*** was decided, there has been no improvement in the provision of approved secure accommodation. On the contrary, the position seems in some respects to have become worse. In its helpful written submissions to this court, the Association of Lawyers for Children ("ALC") provided the following overview:

> "Recent data published by the Department of Education (DfE) shows that there are 259 places in approved secure children's homes in England and Wales. The figures incorporate youth justice and welfare placements (under s.25 Children Act 1989). The approved homes are not at full occupancy; this year there was a reduction in the number of children accommodated in approved secure units to 172 (60% reduction from 204 last year), largely in youth justice occupancy. Of those, 56% are accommodated on welfare grounds (97 children). This is broadly the same as last year (96 children), save that now welfare is the largest population in secure children's homes …. Occupancy rates are down to 66% - the reason for which include the refurbishment of homes [according to statistics provided by DfE] or 'they do not have enough staff to operate at full capacity' [according to information set out in a report by the Children's Commissioner entitled 'Who are they? Where are they? Children Locked Up' published in May 2019] ….

> In England and Wales, 13 secure children's homes accept children placed on welfare grounds [according to the Children's Commissioner's report, page 10]; seven units will take children placed only on welfare grounds and six accept children placed on both welfare and youth justice grounds. There are two further secure children's homes which take only youth justice placements, but local authorities may purchase a welfare bed at these units. Many children are placed far away from their home area due to the limited spread of placements. A census undertaken by researchers for the NHS in 2016 found that 91% of children placed under s.25 were placed outside of their home county …"

6. This significant shortfall in the availability of approved secure accommodation is causing very considerable problems for local authorities and courts across the country. It has been the subject of expressions of judicial concern in a number of cases by judges dealing with these cases on a regular basis, notably by Holman J in *A Local Authority v AT and FE* [2017] EWHC 2458 (at paragraph 6):

> "I am increasingly concerned that the device of resort to the inherent jurisdiction of the High Court is operating to by-pass the important safeguard under the regulations of approval by the Secretary of State of establishments used as secure accommodation. There is a grave risk that the safeguard of approval by the Secretary of State is being denied to some of the most damaged and vulnerable children."

The absence of sufficient resources in such cases means that local authorities are frequently prevented from complying with their statutory obligations to meet the welfare needs of a cohort of vulnerable young people who are at the greatest risk of harm. The provision of such resources is, of course, expensive but the long-term costs of failing to make provision are invariably much greater. This is a problem which needs urgent attention by those responsible for the provision of resources in this area.

Background

7. The facts of this worrying case can be summarised briefly. B was born in 2003 and is now aged 15. Until a year or so ago, she was not known to social services. In September 2018, she was referred to the local authority after making allegations of sexual abuse by a 52-year-old man. A month later, there was a further referral after she alleged that she had been abused by her mother and stepfather. In November 2018, she was arrested after allegedly starting a fire at home and threatening her mother and stepfather with knives and screwdrivers. Further alleged acts of aggression followed and she absconded from home on a number of occasions, on at least one occasion being found in the company of an adult male.

8. In the following weeks, B assaulted her mother and stepfather on a number of other occasions. In January 2019, she was accommodated by the local authority in a residential home under s.20 of the Children Act. The local authority then started care proceedings and was granted an interim care order. But B's behaviour continued to cause concern. She absconded from the residential home on several occasions, assaulted

members of staff, and cut herself with broken glass. The local authority decided to seek a secure accommodation order and started looking for a place in an appropriate children's home approved for such use by the Secretary of State. While they were seeking a place, B's behaviour became more extreme. A mental health assessment concluded, however, that she was not suffering from any acute mental illness.

9. On 11 May, B took an overdose of ibuprofen and was admitted to hospital but discharged later that day. On the following day, she attempted to throw herself off a bridge into the canal. On 14 May, she was involved in a series of incidents in the community in which she placed herself at risk of serious harm, including another attempt to jump off a bridge. Police had to be called to assist in getting her back to the residential home. On 15 May, the local authority, having failed to find a place in an approved secure unit, approached a local agency about an alternative placement. The agency specialises in providing shared accommodation and sole placements for young people aged over sixteen. The agency service director suggested a possible placement at a property, hereafter referred to as "N House", that had been purchased to accommodate five children with autism and was nearing completion. It suggested that B could be admitted to the property as a sole resident. The property, however, was not registered with Ofsted nor approved by the Secretary of State for use as secure accommodation. In those circumstances, the local authority initially decided that the agency would not be able to offer an appropriate placement. On 16 May, however, B was involved in a fight with other residents in the residential home and as a result staff took her to a hotel overnight. The local authority decided that alternative accommodation was required immediately and after further discussions with the agency B was admitted to N House for respite care over the weekend of 17 to 19 May.

10. On Monday 20 May, the local authority applied to court for an order under the inherent jurisdiction authorising the authority to keep B at N House. In a statement in support of the application, the allocated social worker asked the court to make orders "requiring that B be kept at N House and that it is lawful to meet her care needs whilst she is placed there, including by restricting her liberty". The measures proposed were that she be prevented from leaving the premises unless accompanied by support staff with a high level of supervision, of at least 2:1; that her access to other young people should be restricted until such time as her coping abilities had improved; that all doors and windows should remain locked; that she should be under constant 2:1 supervision at the property; that she should have restricted access to glass, knives, cutlery and razor blades and her access to other items such as pens and hair brushes should be carefully monitored; and that her use of phones and the internet should be restricted. At a hearing on that day, HH Judge Anderson, sitting as a judge of the Family Division, made an order under the inherent jurisdiction approving the placement until further order in the following terms:

> "the placement of B at N House with [the agency] is appropriate in her best interests and it is lawful for her assessed care and support needs to be met at the placement (which may amount to a deprivation of liberty) notwithstanding that the placement is not registered with Ofsted."

It is accepted that, taken together, the measures imposed at N House amounted to a deprivation of B's liberty within the meaning of Article 5 of the ECHR.

11. On 22 May, while on a walk with staff members, B passed a derelict house and threatened to enter the property to find glass to harm herself. After returning to N House, B absconded and attempted to return to the derelict building. As a result, she had to be restrained. Although she was subject to restrictions at N House, B initially continued to attend school. On 24 May, she left the school premises, returned to her family home, and assaulted her stepfather. She was collected by agency staff and returned to N House. After this incident, she did not return to school before the next court hearing. Under the regime imposed at N House, there were no further incidents of absconding, but there were several further reports of attempts at self-harm. The agency staff at N House informed the allocated social worker that B needed to be at an approved secure unit, although they agreed to continue to provide accommodation for B until such a placement became available.

12. The local authority therefore continued to search for a placement in approved secure accommodation and, after a further week or so, found a place in a unit on the South coast, several hundred miles away from B's home. On 4 June, the local authority therefore applied for an order under s.25. When the application came before the court on 10 June, however, HH Judge Hayes QC refused to make the order, holding that the criteria for making such an order were not satisfied and, in addition, that it would be disproportionate to make the order. This is the order under appeal and I shall consider the evidence and judgment below.

13. Thereafter, B remained at N House. On 18 June, HH Judge Lynch, who was case managing the care proceedings, extended the order under the inherent jurisdiction. On 8 July, Judge Hayes refused an application for permission to appeal his order of 10 June. On the same day, the local authority filed a notice of appeal against the order. On 29 July, permission to appeal was granted by Peter Jackson LJ, who also invited the ALC to intervene by filing written submissions.

14. Meanwhile, when the care proceedings came back before Judge Lynch on 6 August, she adjourned the issues resolution hearing to 9 October. The judge released the local authority's final care plan and the guardian's final analysis for use at this appeal hearing. Judge Lynch's order of 6 August contained a number of recitals, including:

    - that all parties agreed that the final care plan and guardian's analysis should be admitted into this appeal;

    - that no steps had yet been taken by the agency to register N House with Ofsted as a children's home or obtain the approval of the Secretary of State to use it as secure accommodation;

    - that it is proposed by the local authority that B must move to another placement because the local authority has resolved that the placement cannot continue on grounds of cost and because it is required for other young people, and is neither regulated or approved;

    - that the court accepts that it cannot compel the local authority to continue to fund the placement, and

    - that the court is of the view that this appeal is "highly relevant to the care planning exercise that must now be undertaken".

15. The appeal was heard by this court on 10 September. At the conclusion of the hearing, we reserved judgment.

Section 25, relevant regulations and guidance

16. S.25 is found in Part III of the Children Act which (as amended) is headed "Support for children and families provided by local authorities in England". Other sections in Part III deal with, inter alia, the provision of services for children and their families, the provision of accommodation for children, the duties of local authorities in relation to children looked after by them, and advice and assistance for certain children and young persons. A "looked after" child is defined as a child who is either in the care of the local authority or provided with accommodation by the authority in the exercise of certain statutory functions: ss.22(1) and 105(4).

17. Amongst the statutory duties of local authorities in relation to looked after children set out in ss.22 to 22G is the so-called general duty in s.22 which includes, under s.22(3):

> "It shall be the duty of a local authority looking after any child
>
> (a) to safeguard and promote his welfare…"

The duties under s.22, including the duty under subsection (3)(a), are, however, qualified by s.22(6) which provides:

> "If it appears to a local authority that it is necessary, for the purpose of protecting members of the public from serious injury, to exercise their powers with respect to a child whom they are looking after in a manner which may not be consistent with their duties under this section, they may do so."

18. S.25 is headed "Use of Accommodation for Restricting Liberty". As amended and so far as relevant to this appeal, it provides as follows:

> "(1) Subject to the following provisions of this section, a child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in accommodation in England or Scotland provided for the purpose of restricting liberty ('secure accommodation') unless it appears
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> (a) that –
>
> (i) he has a history of absconding and is likely to abscond from any other description of accommodation, and
>
> (ii) if he absconds, he is likely to suffer significant harm; or
>
> (b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

(2) The Secretary of State may by regulations

(a) specify a maximum period

(i) beyond which a child may not be kept in secure accommodation in England or Scotland without the authority of the court, and

(ii) for which the court may authorise a child to be kept in secure accommodation in England or Scotland;

(b) empower the court from time to time to authorise a child to be kept in secure accommodation in England or Scotland for such further period as the regulations may specify;

(c) provide that applications to the court under this section shall be made only by local authorities in England or Wales.

(3) It shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case.

(4) If a court determines that any such criteria are satisfied, it shall make an order authorising the child to be kept in secure accommodation and specify the maximum period for which he may be so kept.

(5) On any adjournment of the hearing of an application under this section, a court may make an interim order permitting the child to be kept during the period of the adjournment in secure accommodation.

(5A) Where a local authority in England or Wales are authorised under this section to keep a child in secure accommodation in Scotland, the person in charge of the accommodation may restrict the child's liberty to the extent that the person considers appropriate, having regard to the terms of any order made by a court under this section.

(6) No court shall exercise the powers conferred by this section in respect of a child who is not legally represented in that court unless, having been informed of his right to apply for the provision of representation under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and having had the opportunity to do so, he refused or failed to apply.

(7) The Secretary of State may by regulations provide that

> (a) this section shall or shall not apply to any description of children specified in the regulations;
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> (b) this section shall have effect in relation to children of a description specified in the regulations subject to such modifications as may be so specified;
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> (c) such other provisions as may be so specified shall have effect for the purpose of determining whether a child of a description specified in the regulations may be placed or kept in secure accommodation in England or Scotland;
>
> (d) a child may only be placed in secure accommodation that is of a description specified in the regulations (and the description may in particular be framed by reference to whether the accommodation, or the person providing it, has been approved by the Secretary of State or the Scottish Ministers).
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> (8) The giving of an authorisation under this section shall not prejudice any power of any court in England and Wales or Scotland to give directions relating to the child to whom the authorisation relates.
>
> …."

19. S.25 has been amended on several occasions since the Act was originally passed in 1989. Following the devolution of social care regulation to the Welsh Government, references to Wales in the original version of the section were removed. Wales now has a separate regime for secure accommodation under s.119 of the Social Services and Wellbeing (Wales) Act 2014 ("SSW(W) 2014"), although the provisions are substantially the same as under s.25 of the Children Act. Following a number of cases where young people were placed by local authorities in secure accommodation in Scotland, further amendments were introduced to regulate such placements. For the purposes of this appeal, it is relevant to note that subsection (7)(d) was inserted by the Child and Social Work Act 2017. When originally passed, the powers to make regulations governing the use of types of accommodation as secure accommodation were contained in the Schedules to the Act and in particular Schedule 4, making provision for the management and conduct of community homes, the precursor of children's homes, paragraph 4(2)(i) of which provided that regulations may

> "require the approval of the Secretary of State for the provision and use of accommodation for the purpose of restricting the liberty of children in such homes and impose other requirements (in addition to those imposed by section 25) as to the placing of a child in accommodation provided for that purpose, including a requirement to obtain the permission of any local authority who are looking after the child".

20. The regulations relevant to this appeal are the Children (Secure Accommodation) Regulations 1991 ("the 1991 Regulations"). They have also been amended on several occasions since the introduction of the Children Act, most recently by the Children and Social Work Act 2017. The relevant provisions for the purposes of this appeal, as currently in force, are as follows.

- Regulation 2, headed "Interpretation", provides inter alia that, in the Regulations, unless the context otherwise requires, "children's home" means "(a) a private children's home, a community home or a voluntary home in England or (b) an establishment in Scotland (whether managed by a local authority, a voluntary organisation or any other person) which provides residential accommodation for children for the purposes of the Children's Hearings (Scotland) Act 2011, the Children (Scotland Act 1995 or the Social Work (Scotland) Act 1968. Regulation 2 also provides that "secure accommodation" means "accommodation which is provided for the purpose of restricting the liberty of children to whom s.25 of the Act … applies".

- Regulation 3 provides inter alia:

  "(1) Accommodation in a children's home shall not be used as secure accommodation unless

  (a) in the case of accommodation in England, it has been approved by the Secretary of State for that use

  (b) in the case of accommodation in Scotland, it is provided by a service which has been approved by the Scottish Ministers ….

  (2) Approval by the Secretary of State under paragraph (1) may be given subject to any terms and conditions that the Secretary of State thinks fit."

  (In passing I note that, as originally passed, regulation 3 provided: "Accommodation in a community home shall not be used as secure accommodation unless it has been approved by the Secretary of State for such use and approval shall be subject to such terms and conditions as he sees fit".)

- Regulation 7 provides that s.25 shall apply to certain other categories of children in addition to those "looked after" by a local authority – for example, children accommodated by health authorities – and makes modifications to some of the provisions in s.25 in respect of those other categories of children.

- Regulation 10(1) provides that "subject to paragraphs (2) and (3) [not relevant to this appeal], the maximum period beyond which a child to whom s.25 of the Act applies may not be kept in secure accommodation without the authority of the court is an aggregate of 72 hours (whether or not consecutive) in any period of 28 consecutive days."

- Regulation 11 provides that "subject to regulations 12 and 13 the maximum period for which a court may authorise a child to whom s.25 of the Act applies to be kept in secure accommodation is three months."

- Regulation 12 provides that "subject to regulation 13 a court may from time to time authorise a child to whom s.25 of the Act applies to be kept in secure accommodation for a further period not exceeding six months at any one time." Regulation 13 makes further provisions with regard to a child who has been remanded to local authority accommodation by a criminal court.

21. A "children's home" is defined in s.1(2) of the Care Standards Act 2000 as "an establishment [which] provides care and accommodation wholly or mainly for children" but this is subject to various qualifications in the Act and regulations which exclude certain types of accommodation from being classified as a "children's home". Thus, for example, s.1(3) provides that "an establishment is not a children's home merely because a child is cared for and accommodated there by a parent or relative of his or by a foster parent", S.1(4A) and (5) exclude hospitals and schools from the definition of a "children's home". Part II of the Care Standards Act makes provision for the registration and regulation of children's homes in England. The Children's Homes (England) Regulations 2015, in addition to excluding other types of accommodation from being classified as a "children's home", prescribe a range of quality standards for children's homes and make further wide-ranging provisions designed to ensure the safety and welfare of children in such establishments. Under regulation 20, headed "restraint and deprivation of liberty":

> "(1) Restraint in relation to a child is only permitted for the purpose of preventing
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> (a) injury to any person (including the child);
>
> (b) serious damage to the property of any person (including the child); or
>
> (c) a child who is accommodated in a secure children's home from absconding from the home.
>
> (2) Restraint in relation to a child must be necessary and proportionate.
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> (3) These Regulations do not prevent a child from being deprived of liberty where that deprivation is authorised in accordance with a court order."

22. A separate regime is provided in Wales for the registration and regulation of "secure accommodation services" under the Regulation and Inspection of Social Care (Wales) Act 2016 and regulations made thereunder. Both sets of regulations provide for inspection of premises and services, in England by Ofsted and in Wales by Care Inspectorate Wales.

23. The statutory guidance about the Children Act ("Court Orders and Pre-proceedings for Local Authorities", 2014) states:

> "40. Restricting liberty of a child is a serious step that can only be taken if it is the most appropriate way of meeting the child's assessed needs. A decision to place a child in secure accommodation should never be made because no other placement is available, because of inadequacies of staffing in a child's current placement, or because the child is simply being a nuisance. Secure accommodation should never be used as a form of punishment.
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> 41. This does not mean, though, that restriction of liberty should only be considered as a 'last resort'. Restricting the liberty of a child could offer a positive option. A decision to apply for an order under s25 of the Act should be made on the basis that this represents the best option to meet the particular needs of the child. The placement of a child in a secure children's home should, wherever practicable, arise as part of the local authority's overall plan for the child's welfare.
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> 42. For some children a period of accommodation in a secure children's home will represent the only way of meeting their complex needs, as it will provide them with a safe and secure environment, enhanced levels of staffing, and specialist programmes of support. A secure placement may be the most suitable, and only, way of responding to the likelihood of a child suffering significant harm or injuring themselves or others.
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> …
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> 47. It is the role of the court to safeguard the child's welfare from inappropriate or unnecessary use of secure accommodation, by satisfying itself that those making the application have demonstrated that the statutory criteria have been met."

24. As the ALC pointed out in its submissions, the assertion that secure accommodation is not necessarily a last resort represents a change of emphasis. Earlier guidance had stated that secure accommodation was "a last resort in the sense that all else must have first been comprehensively considered and rejected". Whether this amendment is consistent with principle is a matter considered later in this judgment.

The hearing and judgment at first instance

25. At the hearing on 10 June, the local authority's application was opposed by B's mother and stepfather and by the children's guardian. B herself was in court and the judge was told that she wanted to stay at N House. In support of its application, the local authority relied on statements from the key social worker and also the agency's service manager at N House. The social worker reported that a clinical psychologist from CAMHS had visited B at N House but advised that direct therapy could not begin until B was consistently safe and settled. He described the approved secure establishment on the

South coast as providing a placement that was able to keep B safe and manage the risks within a therapeutic environment. In her statement, the service manager at N House reported that all members of the team supporting B agreed that the provision at N House was not able to meet her needs and supported the local authority application for several reasons. Although B had been generally settled at N House, she needed intervention from CAMHS to help her deal with her emotions. The agency running N House was unable to provide on-site therapeutic support of the kind available in approved secure accommodation. The risks remained high and the team considered that, if B did not get the help she needed from mental health services, her behaviours would escalate and she would again be at risk of serious harm. The service manager also pointed out that the approved secure accommodation which the local authority had identified had taken time to arrange and, if this opportunity were missed, there was a risk that B would have no placement available. The service manager concluded her statement with these words:

> "B requires stability and long-term therapeutic support. B has shown she is able to regulate herself and wants help. There are positives and negatives with both options before the court. I believe the overriding need is for B to get the right mental health support, and this is only viable through the secure unit placement at this time."

26. In her oral evidence, the service manager described how B was taken to and collected from school by N House staff, but that, while she was at school, there was nothing to prevent her leaving the premises. Within N House, the staff were able to minimise the risk of self-harm but could not eliminate the risk completely. The key social worker provided more details of the secure establishment on the South coast, describing it as a purpose-built secure unit in contrast to N House which he said had been "a temporary arrangement until something suitable came forward". He gave details of the therapeutic provision at the secure unit which was not available at N House. The key social worker stated that, if B remained at N House and returned to her school, there remained a risk of absconding. In contrast, at the unit on the South coast, education would be provided on the premises. He acknowledged that staff at N House had been "incredible in the support they have provided" and that they had "been able to provide a relatively stable and caring environment that [sic] developed a positive relationship with B". He qualified this, however, by saying that they were at the very early stages and he felt that in some respects N House was "out of its depth with B".

27. In his judgment, Judge Hayes said that there was no question that the placement at N House had brought about "significant and beneficial change" for B. He noted the social worker's concern that the placement was at its early stages and that N House was out of its depth, whereas the secure unit on the South coast would be able to meet all of B's needs including on-site education and psychological assistance. The judge recorded, however, that B's parents, B herself and the guardian were deeply concerned about the implications for B of moving so far away.

28. The ratio for the judge's decision was set out in the following paragraphs of his judgment:

> "20. … there is no question that, looking at the whole of B's history, she does have a history of absconding. The question to my mind is the second part of the wording of s.25(1)(a), whether

it is established that she is 'likely to abscond from any other description of accommodation'

21. That is an important safeguard built into the legislation. The legislation is designed to have strict criteria that must be both fulfilled before the local authority is able to establish that a secure accommodation order should be made. What I am faced with in the current situation is, in fact, an overwhelmingly positive description of the care arrangements that have been put in place for B at N House.

22. [The service manager] herself said that once N House have the authority of the court to put in place arrangements which amounted to a deprivation of liberty, it was able to do so. She has described … that they have worked well. Two staff go with B whenever she is out in the community. Waking night-staff are on shift throughout the night to monitor B when she is in the accommodation, doors and windows are kept locked and two staff are on hand, and the staff continually assess the risk of her behaviours and, if required, can restrain B if she is at serious risk of harming herself or others. What that shows is that there is, here, in place an alternative to secure accommodation which enables N House, legally, to put in place arrangements to prevent B from absconding.

23. The nub of the issue becomes the need for B to be educated. The local authority say that, because of the one incident on 24 May 2019 when B left the school, this shows that these arrangements mean that she is likely to abscond when she is at school. I am, however, far from satisfied that the local authority, based on that one single incident, is able to establish that that part of the wording in s.25(1)(a) ("likely to abscond from any other description of accommodation") is met. I am persuaded by the submissions made to me that the local authority has it within its power to put in place arrangements addressing the situation at school which would mean that that part of the test is not met and that the local authority should strive to do so.

24. On that basis, I am not prepared to find that the wording of s.25(1)(a) of the test is met.

25. S.25(1)(b) is an alternative ground for secure accommodation and that is that if B "is kept in any other description of accommodation she is likely to injure herself or other persons".

26. Again, I am satisfied that the arrangements that have been put in place for B now are effective. They are working. Indeed, [the service manager's] evidence in very large measure was to that effect. No service or institution presented with a child such as B is able to guarantee the situation. The local authority,

in my judgment, in advancing a case on that ground (s.25(1)(b)) must also bring into account the alternative for B being moved against her will to the other end of the country … and the effect that that might have on her own behaviour.

27. In my judgment, the local authority, on the positive evidence presented to the court as to the care arrangements now in place for B at N House, are not able to establish that limb of the test either. So much of the local authority's written evidence, in my judgment, shows that the real basis for their thinking is one that cannot be brought within section 25. I do not criticise [the service manager] for this at all. She presented as a professional person who was concerned to do what was right and best for B. But when I read her statement, I was struck by the fact that when she spoke of the risk to B, she spoke of them in the context that if the deprivation of liberty safeguards were removed from her, or if they were successful in the challenge, or if B escalated her behaviours such as she was focused on breaking the placement down. But *none of these things have arisen*, as she told me very clearly in her oral evidence. The whole point of s.25 is to ensure that the statute is properly interpreted and applied to the situation that there is now. I am not prepared to say that any of those matters, which are contingent on things which have not happened or presuppose the introduction of less restrictive arrangements for B (which is not contemplated by anyone at this stage) somehow satisfy the test in section 25. They do not.

28. So it is that I am not satisfied, as at this time on the evidence before me, that the s.25 grounds for secure accommodation are, in fact, made out. There is, I should add, a line of authority which suggests that proportionality should feature as part of this exercise. The strict approach is one of strict statutory interpretation, the alternative approach – which has some support from some case law - is that proportionality should be brought into account.

29. In many respects, what I am about to say is academic, because I have found that the s.25 criteria are not met. But if I were permitted to introduce proportionality into the overall exercise, in this particular case given the huge beneficial changes that have been brought about since the middle of May for B since the placement at N House, given the professional praise that there has been for those changed arrangements, given that that placement secures for B an alternative placement which is meeting her needs, safeguarding her at a time when she can remain in close proximity to her family home, given it accords with her wishes, given it has enabled good quality relationships to be formed with other professionals, given it does allow for psychological input for B locally which can be continued rather

> than starting again, and given it has the support of her children's guardian, proportionality would also very strongly come down in favour of the decision that I have made …."

Submissions

29. On behalf of the local authority, Mr Frank Feehan QC leading Mr Brett Davies put forward the following submissions.

30. First, it was submitted that to constitute "secure accommodation", a place does not have to be registered or designated as such. Each case depends on its own facts. It is the restriction of liberty that is the essential factor. In support of this submission, Mr Feehan relies on the decisions of Cazalet J in *A Metropolitan Borough Council v DB* [1997] 1 FLR 767 and Wall J in *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180. In the present case, the regime at N House as described by the service manager clearly amounted to accommodation "provided for the purpose of restricting liberty". It is submitted that the judge was therefore wrong to say that the accommodation at N House came within the category of "any other description of accommodation" under s.25(1) and wrong to conclude that the criteria for making a secure accommodation order under that subsection were not satisfied.

31. Secondly, it was submitted that, even if the judge was right to conclude that N House came within the category of "any other description of accommodation" under s.25, he was wrong, given the facts in this case and the inherent instability of the placement, to conclude that the conditions in s.25(1) were not satisfied. Mr Feehan submitted that the time for assessing whether the statutory conditions were satisfied was immediately before emergency protective action is taken, which he submitted in this case was at the point when the emergency placement at N House was approved by the court under the inherent jurisdiction. In the alternative, he submitted that, if the time for assessing the risks was at the date of the hearing, the criteria for making the order were still plainly satisfied at that stage. Whilst living at N House, B had continued to harm herself and had absconded from supervision at school. The service manager's evidence had supported the local authority's application and had told the court that, in contrast to the approved secure unit, N House was unable to provide the therapeutic support which B required.

32. Thirdly, Mr Feehan submitted that case law has clearly established that the principle that the child's welfare is the paramount consideration for the court does not apply to applications under s.25. Welfare is a relevant consideration but the court must not substitute its welfare judgment for that of the local authority, given that the child is a "looked after child". In support of this submission, Mr Feehan relied on the decision of Charles J in *S v Knowlsey Borough Council* [2004] EWHC 491 (Fam). The primary welfare determination for the placement of a looked-after child is that of the local authority and the court's function is to assess whether the plan for secure accommodation meets the statutory conditions of s.25 and is within the permissible range of options available to the local authority in exercising its statutory duty. The court cannot compel a local authority to change its care plan simply because it disagrees with its welfare assessment. It is only if the local authority's plan is so deficient as to make it susceptible to challenge under judicial review that the court is entitled to intervene. Once satisfied that the statutory conditions for making the order are satisfied, and that the plan is within the range of permissible options, the court is obliged under

s.25(4) to make the order. In oral submissions, Mr Feehan described the court as a gatekeeper, not a warder. He submitted that the judge in the present case wrongly substituted his own assessment of the child's welfare so as to require her to stay in the present accommodation.

33. Fourthly, it was argued that, where the statutory conditions under s.25(1) for authorisation of secure accommodation are made out, and where such accommodation approved by the Secretary of State is available, it is contrary to authority and clear public policy for a place at an unregulated placement to be continued by use of the inherent jurisdiction. It is acknowledged that the inherent jurisdiction may be used to authorise the placement of a child who would be subject of an order under s.25 but who falls outside the statutory scheme only as a result of the lack of available approved secure accommodation. It is submitted, however, that the use of the inherent jurisdiction should be confined to those cases where there is no other route to providing for the welfare of the child. Where a statutory placement is available, an authorisation should be granted under the statutory scheme rather than under the inherent jurisdiction.

34. The local authority's written submissions did not address the judge's alternative ground for his decision based on his evaluation of proportionality. When challenged during the hearing as to the place of proportionality in an application for a secure accommodation order, Mr Feehan submitted that it was entirely covered by the provisions of s.25 and in particular the statutory conditions in s.25(1) that must be satisfied before an order can be made.

35. In supplemental written submissions, Mr Davies on behalf of the local authority drew attention to the practical difficulties now faced by the local authority which mean it is unable to prepare a final care plan for B. She is in secure accommodation under the inherent jurisdiction where she cannot remain because the local authority has made a commissioning decision to terminate the placement. She needs secure accommodation in an approved children's home, but any search would be of no use unless this appeal is allowed. Although she is making some limited progress, her therapeutic needs are not being met. She needs a specialist therapeutic placement with skilled care staff employing consistent techniques and strategies. Furthermore, she needs a place with onsite provision for education.

36. On behalf of the guardian, Ms Phillips was content to rest her case on the judge's analysis. She submitted that, to be recognised as secure accommodation, an establishment must be both registered with Ofsted and approved by the Secretary of State. The judge was therefore correct to hold that N House fell into the category of "any other description of accommodation" and that, on the facts, at the date of the hearing before Judge Hayes it was no longer the case that that there was a likelihood of absconding from that accommodation.

37. B's mother and stepfather attended the hearing by telephone (a proposed video link having failed). Understandably, they focused their brief observations to the court on B's current circumstances. They told the court that, since the hearing before Judge Hayes, B had become much more settled. They described her behaviour as improving day by day and said that the number of acts of self-harm had dramatically reduced. They were very pleased with the professionalism shown by staff at N House. Their major concern at the date of the hearing was the lack of education provision for B which, they said, did not appear to be part of any care plan. In their view, the only

reason to move B would be the cost of the placement. They accepted that it was expensive but, in their view, it was meeting B's needs.

38. Following the invitation by Peter Jackson LJ when granting permission to appeal, the Association of Lawyers for Children ("ALC") filed extensive written submissions drafted by Lorraine Cavanagh QC, Denise Gilling and Baljinder Bath. This court is grateful to them, and their instructing solicitor Somia Siddiq, for this helpful contribution. The submissions go beyond the scope of this appeal in several respects. I propose to refer only to those matters raised which are pertinent to the issues before us.

39. The ALC noted the definition of "secure accommodation" in s.25(1) but submitted that this definition "is developed further at s.25(7)" and that, as a result, it incorporates the description of approved accommodation in Regulation 3 of the 1991 Regulations. It was submitted that, as a consequence, a child may not be placed and, if placed, may not be kept in accommodation provided for the purpose of restricting liberty unless

    (a) the conditions in s.25(1)(a) or (b) are satisfied;

    (b) an order under s.25 has been made, and

    (c) where the accommodation is a children's home, then the accommodation has been approved by the Secretary of State and meets the requirements of the 1991 Regulations.

40. The ALC submitted that any enlargement of the meaning of "secure accommodation" to encompass placements which otherwise meet the definition of a "children's home" (even if unregistered) which are unauthorised by the Secretary of State is a step which runs contrary to the ordinary reading of the section and Regulations. It was submitted that, if the appellant's analysis is correct, then, when faced with an application under s.25 to be placed in approved secure accommodation, a child would be unable to argue for any less restrictive regime where the purpose of the accommodation is a restriction of liberty because such alternatives as existed would not amount to "any other description of accommodation". It was pointed out that most placements for children with escalating behaviour difficulties have restrictions on liberty as the primary focus. It is in the interests of such children for there to be no compromise on the scope of the judicial exercise of scrutinising the alternatives to approved secure accommodation. The ALC is concerned that, if the court accepts the local authority's submission as to the meaning of "secure accommodation", judges may be faced with a marked reduction in placement options for a child with behavioural problems, with the result that a regulated secure children's home may be the only realistic option available to the court.

41. The ALC urged the court to adopt a more flexible approach than that advocated by the appellant. It was submitted that there is a need for bespoke placements which restrict the liberty of children with escalating or complex behaviours even if those placements are, out of necessity, unregulated and unregistered. The ALC says that it does not seek to encourage inappropriate use of the inherent jurisdiction, particularly where an approved secure accommodation unit is the only description of accommodation that would keep a child from suffering significant harm. But it does urge this court not to discourage the use of what it describes as imaginative arrangements which cater to the risk profile of a child, particularly so when there is the potential to divert the child into

a less restrictive regime. Notwithstanding the amended guidance, the ALC contends that secure accommodation should always be regarded as a last resort.

42. It was acknowledged on behalf of the ALC that the family court has no power to require a local authority to expend resources to commission a particular placement or service for a child: *A v Liverpool City Council* [1982] AC 363, *Holmes-Moorhouse v Richmond-upon-Terms London Borough Council* [2009] UKHL 7, *ACCG v MN* [2017] AC 549. On the other hand, the court is not obliged to accept without question a local authority's assertions as to its resources. As Sir James Munby P observed in *Re MN (An Adult)* [2015] EWCA Civ 411 (a case involving an incapacitated adult under the Mental Capacity Act in which the President identified a common approach in cases involving children), although the court cannot order local authorities to provide particular services, it is under a duty to scrutinise the local authority's care plan and satisfy itself that it is in the child's interests. The court must consider whether the detention of the child in secure accommodation would be in accordance with the local authority's duty under s.22(3) to safeguard and promote the child's welfare. The ALC contended that, in any welfare analysis, there is a check on the necessity and proportionality of making the order.

43. The ALC submitted that the time at which the relevant criteria must be satisfied is at the date of the hearing rather than immediately before the application is filed. To hold otherwise would bind the child's future placement to events which may have occurred weeks or months before the hearing and allow no discretion or evaluation of any improvements or other changes which may have occurred subsequently.

44. Central to submissions made by the local authority and the ALC, as I read them, is an assumption that s.25(4) makes it mandatory for a court to make an order if the conditions in s.25(1)(a) or (b) are satisfied. This requires consideration of the meaning of the words "relevant criteria" in s.25(3).

45. I turn now to the four questions identified at the start of this judgment.

The meaning of "secure accommodation"

46. The phrase "secure accommodation" is defined in s.25(1) as meaning "accommodation … provided for the purpose of restricting liberty". The same definition appears in Regulation 2 ("accommodation which is provided for the purpose of restricting the liberty of children to whom s.25 … applied"). At first sight, this looks like a relatively straightforward definition, although, as will become clear, it is by no means necessarily easy to apply.

47. The ALC argues that the effect of s.25(7)(d) and Regulation 3 of the 1991 Regulations is to incorporate into the definition of "secure accommodation" for the purposes of s.25 the qualification that, if the accommodation is a children's home, it must be approved by the Secretary of State for that use. But there is nothing in s.25 itself to suggest that the meaning of the words "secure accommodation" is qualified by reference to s.25(7)(d) or Regulation 3. A close examination of the words of the section and the Regulation demonstrates that this is not so. S.25(7)(d) provides that "the Secretary of State may by regulations provide that … a child may only be placed in secure accommodation that is of a description specified in the regulations …". Adopting a straightforward construction of s.25(7)(d), the phrase "secure accommodation that is of

a description specified in the regulations" describes a subset, not a prerequisite, of "secure accommodation". Similarly, a straightforward construction of Regulation 3(1) ("accommodation in a children's home shall not be used as secure accommodation unless … approved by the Secretary of State for that use") is that it excludes certain accommodation from being used as secure accommodation, but does not alter the definition of "secure accommodation" itself. Although Regulation 3(1) (as Regulation 3 in the original form of the Regulations made pursuant to powers granted in the original Schedule 2 to the 1989 Act) has been in force since the early days of the Children Act 1989, s.25(7)(d) was only inserted by amendment introduced in the Children and Social Work Act 2017. Thus, if the ALC's submission is correct, the definition of "secure accommodation" was changed by this amendment. If it had been Parliament's intention to change the meaning of "secure accommodation", it would surely have done so in much clearer terms.

48. A straightforward construction of the words of s.25 therefore leads to the conclusion that "secure accommodation" means nothing more or less than accommodation provided for the purpose of restricting liberty.

49. This interpretation is supported by case law. In *A Metropolitan Borough Council v DB* [1997] 1 FLR 767, the subject of the application was a 17-year-old crack cocaine addict who gave birth in hospital and was subsequently prescribed treatment for pre-eclampsia and the effects of a Caesarean section. She refused treatment and stated her wish to be discharged from hospital. The local authority applied under s.25 for an order authorising her placement in secure accommodation, namely the maternity ward of the hospital. It was argued on behalf of DB that the hospital ward was not secure accommodation and that the local authority application was misconceived. Cazalet J made the order, stating (at page 774):

> "It is important to note that it is the restriction of liberty which is considered to be the essential factor in determining what is secure accommodation. To constitute secure accommodation, a place does not have to be so designated; each case will turn on its own facts."

50. In *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, an application was made for an order under the inherent jurisdiction in respect of a 16-year-old girl suffering from anorexia nervosa. Wall J held that the court exercising its inherent jurisdiction had the power to direct that she remain as a patient at a clinic until discharged. That power included the authorisation of a detention in the clinic for the purposes of treatment, and the power to authorise the use of reasonable force if necessary for that purpose. The judge further held, however, that, before exercising that power, he had to consider whether the court's powers under the inherent jurisdiction were ousted by the scheme laid down by Parliament in s.25. He considered the critical question to be whether the clinic in question amounted to "secure accommodation". In addressing that question, he cited various authorities, including the decision in *A Metropolitan Borough Council v DB* and made this observation:

> "Whilst I respectfully agree with Cazalet J that premises which are not designed as secure accommodation may become secure accommodation because of the use to which they are put in the particular circumstances of individual cases, it does seem to me

> that the more natural meaning of the words 'provided for the purpose of restricting liberty' is 'designed for, or having as its primary purpose' the restriction of liberty. The circumstances in which s.25 operates based on the premise that the child has a history of absconding and is likely to abscond from any other description of accommodation the alternative premise, 'that if he is kept in any other description of accommodation he is likely to injure himself or others' once again envisages a secure regime designed to prevent self-harm. I prefer to look at the clinic, and ask myself: 'is it accommodation provided for the purpose of restricting liberty'? This is, of course, as Cazalet J indicates, the question of fact."

Having considered the evidence about arrangements at the clinic in some detail, Wall J concluded that the primary purpose of placement of a child in the clinic was treatment and that the fact that such structure included a degree of restriction on the patient's liberty was an incident of the treatment programme. He therefore held that the clinic was not "accommodation provided for the purpose of restricting liberty" and therefore not "secure accommodation" so as to bring it within s.25.

51. The case law at first instance therefore supports the view that the meaning of "secure accommodation" is as defined in s.25(1). The focus is on the use of accommodation for restricting liberty. If the accommodation was designed for the restriction of liberty, or the primary purpose of the placement is to restrict liberty, it amounts to "secure accommodation" under the Act. If there is a different primary purpose – for example, treatment – the accommodation will not amount to "secure accommodation" even if there is a degree of restriction on liberty.

52. At this point, it is necessary to consider the observations of the Supreme Court in the recent decision in ***Re D*** [2019] UKSC 42. In that case, the High Court had been asked to exercise its inherent jurisdiction to authorise the confinement of a teenage boy in a psychiatric hospital. The issue before the Supreme Court, as articulated in paragraph 3 of the judgment of Baroness Hale of Richmond, was whether it was within the scope of parental responsibility to consent to living arrangements for a 16- or 17-year-old child which would otherwise amount to a deprivation of liberty within the meaning of Article 5 of the ECHR. By a majority of 3 to 2, the Supreme Court held that consenting to such arrangements was outside the scope of parental responsibility so that a 16- or 17-year-old child in those circumstances is to be seen as deprived of their liberty and therefore entitled to the protection afforded by Article 5.

53. After the hearing, the Supreme Court raised with the parties the question whether the restrictions on placing a child in accommodation provided for the purposes of restricting liberty arising from s.25 applied to the sort of living arrangements under consideration in ***Re D***. The parties duly provided supplemental written submissions on that point. The issue was considered by Lady Black at paragraphs 90 to 115 of her judgment, with which the other judges agreed. The reason for raising the issue, as explained by Lady Black at paragraph 91, was that

> "if the section applies to living arrangements like D's, making court authorisation obligatory, the debate as to whether it falls

> within the scope of parental responsibility to authorise a child's confinement would be of far less practical significance".

54. It is apparent from reading Lady Black's judgment that the submissions and deliberations on the issue of the meaning of "secure accommodation" covered some of the same ground as in the present case. For example, it was apparently submitted to the Supreme Court by the Secretaries of State for Education and for Justice (who had been given leave to intervene in the appeal) that, where the accommodation in question is a children's home, it will count as "secure accommodation" only if it has been approved by the Secretary of State for that use. Lady Black expressed some scepticism about the submission at paragraph 98:

> "Whilst it can readily be accepted that the intention is that only properly authorised children's homes are to be used as accommodation for the purpose of restricting liberty, it does not necessarily follow that, in practice, a child could not find him or herself placed or kept in a children's home which, but for the fact that it does not have the Secretary of State's approval, has every appearance of being secure accommodation. If the argument advanced by the Secretaries of State is right, such children might be doubly prejudiced, i.e. placed in an unapproved children's home and outside the protective regime of section 25."

55. At paragraph 99, she added:

> "even if the approach commended by the Secretaries of State is correct, it would not serve to identify "secure accommodation" in all its various settings, but only in so far as children's homes are concerned, and it would leave unanswered questions in relation to many other children. Accordingly, there being no reliable and universally applicable shortcuts to identifying secure accommodation, it is necessary to look more closely at the wording of section 25(1) in order to determine what circumstances fall within it."

56. Looking at the words of that subsection, Lady Black observed, at paragraph 103, that

> "this contrast of 'secure accommodation' with 'any other description of accommodation' can be read as supporting the notion that 'secure accommodation' is a 'description of accommodation', rather than a description of a regime of care."

She cited the decision in ***R v Secretary of State for the Home Department, Ex p A*** [2000] 2 AC 276, in which the House of Lords had considered the phrase "accommodation provided for the purpose of restricting liberty" in the Children and Young Persons Act 1969 when determining whether a young offender sentenced to detention should be given credit for time spent in local authority accommodation. In that case, Lord Clyde had said that

> "The phrase is looking to a category of accommodation, namely accommodation which has been provided for the stated purpose".

Lady Black acknowledged that this interpretation carried weight, given that the House of Lords was concerned with same phrase, but she drew a distinction between the two statutory provisions, at paragraph 109:

> "Focusing on the accommodation itself does not, however, provide such a simple answer to the problem of what is secure accommodation within s.25. s.25 extends well beyond local authority homes, and undoubtedly encompasses secure accommodation which does not have to be approved by the Secretary of State. Furthermore, the purpose of the provisions considered by the House of Lords was very different from the purpose of s.25. They were concerned with a scheme which conferred power on a court remanding a child to local authority accommodation to dictate that the child should be kept in secure accommodation as narrowly defined by s.23(4) of the Children and Young Persons Act, and confined credit for time spent in local authority accommodation to that type of accommodation. In contrast, what s.25 has to say about secure accommodation is of much wider application. It does not set out to dictate where a local authority must place/keep a particular child, but to regulate, in both local authority and non-local authority settings, the circumstances in which a child can be placed/kept in secure accommodation as defined in the section."

57. Lady Black then referred the decision of Wall J ("coming closer to home", as she put it) and cited the passage from his judgment which I have quoted at paragraph 50 above.

58. Lady Black was careful to stress that her observations about s.25 were not to be considered as definitive or binding. At paragraph 112, she said:

> "S.25 has played no direct role in the proceedings in the present case, and the bulk of the argument about it has occurred in writing after the conclusion of the hearing in this court. Nothing that we say about it will conclusively resolve the difficult questions that arise as to its scope and operation, and that is as it should be, because it would be undesirable that final views should be formed, without there having been an opportunity for oral argument. Furthermore, it would be better that such issues as there are about the scope of section 25 should be resolved in a case where the relevant facts have been found, so that the section can be interpreted with reference to a real factual situation."

With that caveat, however she set out her conclusions in these terms, at paragraphs 113-5:

> "113. The exercise in which we have engaged has, however, been sufficient to persuade us that section 25 is not intended to be widely interpreted, so as to catch all children whose care needs are being met in accommodation where there is a degree of restriction of their liberty, even amounting to a deprivation of liberty. There is much force in the argument that it is upon the accommodation itself that the spotlight should be turned, when determining whether particular accommodation is secure accommodation, rather than upon the attributes of the care of the child in question. This fits with the language used in section 25(1), when read as a whole. It is also consistent with the objective of ensuring that the section is not so widely drawn as to prejudice the local authority's ability to offer children the care that they need, and it ought to make it more straightforward to apply than would be the case if the issue were dependent upon the features of a child's individual care regime, so that the child might be found to be in secure accommodation in all manner of settings.
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> 114. A restrained construction of the section is also justified by the fact that, far from being concerned with the routine sort of problems that might require a child's freedom to be curtailed, the section has a "last resort" quality about it. It is concerned with accommodation which has the features necessary to safeguard a child with a history of absconding who is likely to abscond from any other description of accommodation or to prevent injury where the child in question would be likely to injure himself or others if kept in any other description of accommodation.
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> 115. Of course, training the spotlight on the accommodation itself does not provide a complete answer to the question as to what falls within the definition of secure accommodation. Some secure accommodation will be readily recognisable from the fact that it is approved as such by the Secretary of State, but that is by no means a universal hallmark, as that approval is not needed for all types of secure accommodation. Moreover, given that it is contemplated that secure accommodation might be provided in places such as hospitals, it seems likely that there will not infrequently be more than one purpose of the child being in the accommodation, and there is much to commend Wall J's approach to such a situation, that is to count within the definition of secure accommodation "designed for or having as its primary purpose" the restriction of liberty. Equally, the section will have to be interpreted in such a way as to allow for situations where only a part of the premises is made over to restricting liberty."

59. I respectfully agree with Lady Black's obiter observations in ***Re D*** as to the meaning of "secure accommodation". Like her, in considering this issue I have been increasingly drawn back to Wall J's analysis in ***Re C***. In my judgment, "secure accommodation" is accommodation designed for, or having as its primary purpose, the restriction of liberty.

As Wall J acknowledged, however, premises which are not designed as secure accommodation may become secure accommodation because of the use to which they are put in the particular circumstances of the individual case.

60. Unlike *Re D*, the present appeal does require the court to interpret the section with reference to a "real factual situation". As Lady Black recognised, however, training the spotlight on the accommodation does not provide a complete answer to the question. She acknowledged that, while some types of secure accommodation will be readily recognisable as such, others will not. In some cases, it will not be easy to say whether the accommodation is or is not "secure". The present case is just such a case. I shall return to this point below.

What are the relevant criteria for making an order under s.25?

61. As set out above, s.25(3) provides that "it shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied" and s.25(4) provides that, "if a court determines that any such criteria are satisfied, it shall make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which he may be so kept".

62. What is meant by "any relevant criteria"? At first sight, it might appear that the criteria that are "relevant" to the court's decision are merely the conditions in s.25(1). On closer examination, however, that is plainly not the whole answer. S.25(3) does not simply require the court to determine whether the conditions in s.25(1)(a) or (b) are satisfied, and s.25(4) does not oblige the court to make the order if it determines that one or other of those conditions is satisfied. Plainly there are other "relevant criteria" which must be satisfied before an order must be made. These include (1) whether the child is being "looked after" by a local authority (or alternatively comes under one of the other categories of children identified in Regulation 7); (2) whether the accommodation proposed by the local authority is "secure accommodation" in the sense already discussed; (3) whether, if the local authority is proposing to place the child in a secure children's home, the accommodation has been approved by the Secretary of State for that use, and (4) whether, if the child is aged under 13, the placement of that specific child has been approved by the Secretary of State.

63. In addition, over the years since implementation of the Children Act, a number of judges have suggested, in differing terms and with varying levels of confidence, that a court determining an application under s.25 is obliged to consider the welfare of the child and/or the proportionality of the proposed order. As I read his judgment in this case, Judge Hayes took both matters into consideration as the alternative ground for his decision. It is therefore necessary for this Court to consider the role which welfare and proportionality play in the court's decision-making. Are they "relevant criteria" under s.25(3) and (4)?

Does an assessment of welfare play any part in the court's decision?

64. For over a hundred years, the law of England and Wales has recognised that the child's welfare is the paramount consideration when a court is determining any question about his or her upbringing. The principle is now enshrined in s.1(1) of the Children Act 1989. S.1(3) contains a checklist of factors related to welfare to be taken into account in

certain proceedings under the Act, but proceedings under Part III are not included. Part III is not, however, expressly excluded from the ambit of s.1(1). As a decision whether or not to place a child in secure accommodation would appear to involve a question with respect to her upbringing, it might be thought that the paramountcy principle applies to applications under s.25.

65. For nearly 25 years, however, since the decision of this court in *Re M (Secure Accommodation Order)* [1995] Fam 108, it has been accepted that the child's welfare is not paramount when deciding an application under s.25. There remains, however, some uncertainty as to the extent of the evaluation of welfare which the court is required to undertake.

66. In *Re M*, the Court of Appeal (Butler-Sloss and Hoffmann LJJ and Sir Tasker Watkins) upheld a decision of Ward J who had dismissed an appeal from the family proceedings court authorising the local authority to keep a boy in secure accommodation. Giving the first judgment of the court, Butler-Sloss LJ (at pages 115-6) said:

> "The framework of Part III of the Act is structured to cast upon the local authority duties and responsibilities for children in its area and being looked after. The general duty of a local authority to safeguard and promote the child's welfare is not the same as that imposed upon the court in s 1(1) placing welfare as the paramount consideration. I agree with Ward J as to the reasons for that distinction. Among those duties and powers is the right of a local authority to hold a child in secure accommodation for up to 72 hours without a court order. To be enabled to do so the local authority has to surmount the hurdle of the requirements of s 25(1). Only if subs (1)(a)(i) and (ii) or (b) are fulfilled may the local authority place or keep a child in secure accommodation. In coming to the decision to restrict the liberty of a child the local authority will also have regard to their duty to safeguard and promote the welfare of a child who is looked after by them (s 22(3)). The welfare principle is rightly to be considered by the local authority in coming to so serious and Draconian a decision as the restriction upon the liberty of the child. They have the power, however, to place him in secure accommodation if he is likely to injure others rather than himself (s 25(1)(b)). This power may be inconsistent with the concept of the child's welfare being paramount.
>
> The jurisdiction of the court is to be found in the same section and the court applies the same criteria in s 25(1) as the local authority. To require the court to have regard to other criteria than those imposed upon the local authority within the same section would, in my view, be inconsistent with the purpose of the section which gives the court the power to authorise the local authority to keep the child in secure accommodation. It is the same power as that exercisable by the local authority in the same way albeit for a much shorter period. By s 25(3) the court has the specific duty to determine whether any relevant criteria are satisfied for keeping a child who may or may not already have

> been placed by the local authority, in secure accommodation for a period longer than 72 hours. In considering 'any relevant criteria' the court has a similar duty to the local authority to include the welfare of the child concerned. Whether it is a reviewing power, as Ward J suggested, or a general duty to consider the welfare of the child, is a matter of words. No one can doubt that the restriction upon the liberty of a child, generally for his own good (subject to s 25(1)(b)) is a serious step which must be taken only when there is no genuine alternative which would be appropriate and, as *The Children Act 1989 Guidance and Regulations, vol 1, Court Orders,* para 5.1 sets out, as a last resort. Clearly the welfare of the child is of great importance and must take its place in the relevant criteria. But if at the end of the day the relevant criteria are satisfied there is a mandatory requirement that the court shall make an order authorising the child to be kept in secure accommodation."

67. Hoffmann LJ, agreed but articulated an interpretation of the section in slightly different terms. At page 117B he said:

> "Section 25 of the Children Act 1989 has taken over in virtually identical terms from s 21A of the Child Care Act 1980, which was inserted into that Act by s 25 of the Criminal Justice Act 1982. This explains a feature of s 25 which might otherwise be puzzling, namely that subs (1) is expressed not as the grant of a power to keep children in secure accommodation if the conditions in paras (a) or (b) are satisfied, but as a restriction on a power which is assumed already to exist."

He continued (at 118B to 119B):

> " … the Child Care Act 1980, being concerned with the powers and duties of local authorities, contained no equivalent of s 1 of the Children Act 1989 and it seems to me very unlikely that s 25 of the latter Act was intended to have a different effect from s 21A of the Child Care Act 1980. The function of the court under s 25 is in my view to control the exercise of power by the local authority rather than to exercise an independent jurisdiction in the best interests of the child.
>
> What form should this control take? Subsection (3) says that the court's duty is to determine whether 'any relevant criteria' are satisfied. What are the relevant criteria? I have already said that in my judgment they do not include the principles in s 1. …. In my judgment the criteria applied by the court must be the same as those applicable to an initial decision by the local authority. These include not only the question of whether para (a) or (b) of s 25(1) is satisfied, but also having regard to the local authority's general duty under s 22(3) to safeguard and promote the welfare of the child, subject to the important qualification in s 22(6)".

Hoffmann LJ set out s.22(6) (recited above) and continued:

> "This subsection is echoed in para (b) of s 25(1), which allows the condition to be satisfied if the child is likely to injure other persons. Both of these provisions are quite inconsistent with the full application of s 1.
>
> It seems to me that the question of whether a decision to keep the child in secure accommodation would be in accordance with these statutory duties imposed upon the local authority must be among the 'relevant criteria' to be considered by the court under s 25(3). It is said that the mandatory language of subs (4) – if the court determines that the criteria are satisfied, it 'shall' make an order – suggests that the criteria must involve giving a yes or no answer to a question of fact rather than a flexible application of general principles. But the mandatory element in subs (4) is to some extent illusory. True, the court shall make an order, but the maximum period for which he may be kept is a matter for the court's discretion. Since there is in practice little difference between an order for a very brief period and no order at all, the use of the word 'shall' does not seem to me to carry much weight. Thus I think that the duty of the court is to put itself in the position of a reasonable local authority and to ask, first, whether the conditions in subs (1) are satisfied and secondly, whether it would be in accordance with the authority's duty to safeguard and promote the welfare of the child (but subject to the qualification in s 22(6)) for the child to be kept in secure accommodation and if so, for how long."

68. The decision in ***Re M*** clearly establishes that the paramountcy principle in s.1 of the Children Act does not apply to applications under s.25. It has been followed by all courts hearing applications under the section and is binding on this court. There is, however, less clarity as to the extent of the evaluation of welfare which the court is required to carry out. There is a small but perceptible difference between the view expressed by Butler Sloss LJ and that of Hoffmann LJ. Both agreed that the court must apply the same criteria as the local authority and that the relevant criteria include welfare. Butler-Sloss LJ considered that the distinction between a reviewing power and a general duty to consider welfare was "a matter of words" but that "the court has the specific duty to determine whether any relevant criteria are satisfied" and that, in performing that duty, welfare is "of great importance". Hoffmann LJ, however, thought that function of the court under s 25 is "merely to control the exercise of power by the local authority rather than to exercise an independent jurisdiction in the best interests of the child".

69. Some might consider this to be a distinction without a difference. It should be noted that the third judge in the constitution, Sir Tasker Watkins, agreed with both judgments. In my view, however, there is a difference of approach in the two judgments. It is therefore unsurprising that in subsequent cases, courts have sometimes struggled with the issue of how to deal with cases where they perceive that, whilst the conditions in s.25(1) are satisfied, the placement proposed by the local authority would be contrary to the child's overall welfare.

70. Hoffmann LJ's interpretation of the function of the court was expressly followed in ***S v Knowsley Borough Council and Others*** [2004] EWHC 491 (Fam) where Charles J made this observation about the passage quoted above:

> "this passage in my view indicates that the court, when making a secure accommodation order, must itself decide whether the s.25(1) criteria are met, but in my view it does not indicate that the court should decide the welfare issues relating to the duty to safeguard and promote the welfare of the child. Rather the passage indicates that the court should assess such welfare issues on the basis that the local authority is the decision maker and thus on the basis whether a placement of the child in secure accommodation is within the permissible range of options open to a local authority exercising its duties and functions to promote and safeguard the welfare of the child who is being looked after by it."

In ***Re SS (Secure Accommodation Order)*** [2014] EWHC 4436 (Fam), Hayden J, however, cited this passage from Charles J's judgment in the ***Knowsley*** case with this comment:

> "On the facts of this case, that distinction, if it is correctly drawn by Charles J, between the rationality of the local authority's interpretation of welfare and the Court's own evaluation of it, is, largely, illusory and, I suspect, always will be, where the liberty of a child is concerned."

71. The proposition that a court hearing an application under the section does not have the child's welfare as its paramount consideration was accepted by Lady Black in ***Re D*** (at paragraph 101). Importantly, however, she added this observation that:

> "It would be surprising if section 25 were intended to be interpreted in such a way as to extend this displacement of the court's welfare role beyond a relatively circumscribed group of children whose circumstances make this unavoidable. Underlining this, it is worth noting that where the position of a child of 16 or 17 is being considered in the Court of Protection under the Mental Capacity Act 2005, welfare is the touchstone, as deprivation of liberty will only be endorsed where it is in the best interests of the child."

72. In my judgment, the "displacement of the court's welfare role" as required by the decision in ***Re M*** extends only to the displacement of the paramountcy principle. It does not require the court to abdicate responsibility for evaluating impact of the proposed placement on the child's welfare. On the contrary, as Butler-Sloss LJ said, the child's welfare is plainly of great importance in deciding whether or not an order should be made. The local authority and the court must each consider whether the proposed placement would safeguard and promote the child's welfare. In some cases, the child's welfare needs will be served by a period in secure accommodation, particularly if supported by a comprehensive therapeutic programme. In other cases, the child's welfare will not be promoted by such a placement. However, just as s.22(6) allows the

local authority to exercise its powers in a way that does not promote the child's welfare if necessary to protect the public, there may be cases where the court concludes that the child's welfare needs are outweighed by the need to protect the public from serious harm. Welfare is therefore not paramount but is plainly an important element in the court's analysis. It is one of the relevant criteria.

73. This interpretation of s.25 is fortified by the Human Rights Act 1998, which came into force five years after ***Re M*** was decided in 1995.

The Human Rights Act and Proportionality

74. S.3(1) of the Human Rights Act requires that, so far as possible, primary and subordinate legislation must be read and given effect in a way which is compatible with rights under the ECHR. S.6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. S.6(3)(a) provides that, for the purposes of the Act, a court is a "public authority".

75. In this case we are concerned in particular with two rights under the ECHR, Article 5, the right to liberty and security, and Article 8, the right to respect for private and family life. So far as relevant, Article 5 provides:

> "(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:
>
> …
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision….
>
> (e) the lawful detention of … persons of unsound mind …"
>
> …
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

76. The meaning of "deprivation of liberty" under Article 5 was settled by the European Court of Human Rights in *Guzzardi v Italy* (1980) 3 EHRR 333 at paragraphs 92-3:

> "92. …In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question….
>
> 93. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance…."

In the United Kingdom, the "acid test" for a deprivation of liberty is that the person concerned is under continuous supervision and control and is not free to leave: *P v Cheshire West and Chester Council; P and Q v Surrey County Council* [2014] UKSC 19.

77. A degree of restriction of liberty is plainly an inevitable feature of parental control of children, and when a local authority is looking after a child, its employees and agents will also impose a degree of restriction on the child, depending on his or her age and circumstances. No court order is required. It is only when the degree and intensity of control crosses the line and amounts to a deprivation of liberty that the provisions of Article 5 apply. In those circumstances, under Article 5(4), the person deprived of their liberty is entitled to a court process to determine the lawfulness of the detention. Although s.25 and the Regulations use the phrase "restricting liberty", in practice an order under s.25 involves a deprivation of liberty under Article 5 of the ECHR: per Dame Elizabeth Butler-Sloss P in *Re K (Secure Accommodation Order: Right to Liberty)* [2001] 1 FLR 526. Accommodation which is provided for the purpose of restricting liberty under s.25(1) has the effect of depriving the child of liberty. That is why a court order is required. Save for the short period provided by Regulation 10(1), a local authority cannot deprive a child of his or her liberty unless it obtains an order of the court, either under s.25 or under the inherent jurisdiction.

78. An order under s.25 will be both a deprivation of liberty and an interference with the child's right to respect for private and family life. It will therefore only be lawful insofar as it complies with the provisions of Articles 5 and 8 of the ECHR and relevant case law of the European Court of Human Rights and domestic courts.

79. This court has previously held that s.25 is compatible with Article 5. In *Re K (Secure Accommodation Order: Right to Liberty)* [2001] 1 FLR 526, the Court of Appeal (Dame Elizabeth Butler-Sloss P, Thorpe and Judge LJJ) refused an application for a declaration that s.25 was incompatible with Article 5 and upheld the secure accommodation order made at first instance. The majority of the court accepted that the order under s.25 in that case was a deprivation of liberty, but the court unanimously held that any such deprivation was not incompatible with the Convention where it was justified within Article 5(1)(d) as the detention of a minor by lawful order for the purpose of educational supervision. The court held that educational supervision was not to be equated rigidly with notions of classroom teaching, but, particularly in a care context, should embrace

many aspects of the exercise by the local authority of parental rights for the benefit and protection of the child concerned.

80. It has been suggested that the decision in ***Re K*** should be treated with caution because the proposition that a statutory duty to educate renders all secure accommodation orders as made for the purpose of educational supervision stretches the concept of "educational supervision" beyond its natural meaning and the language of s.25(1) to breaking point ("The Rights of the Child", A MacDonald, 2011, para 14.123). There may be cases where the deprivation of a child's liberty can be justified under Article 5(1)(e) where the child is shown to be of "unsound mind". Be that as it may, ***Re K*** has not been challenged in any subsequent case and is binding on this court.

81. But the fact that s.25 is not incompatible with Article 5 does not absolve a court from considering the human rights involved in an application. On the contrary, the fact that an order under s.25 involves a deprivation of liberty and interference with private and family life obliges the local authority and the court to comply with the Convention and the jurisprudence under it.

82. The test of review adopted by courts under the Human Rights Act is the principle of proportionality. It applies most obviously to the so-called "qualified" rights under the Convention, including Article 8, where interference with the right may be justified where it is "necessary in a democratic society". There has been some debate as to the extent to which it applies to Article 5. In ***Re D*** Lady Arden at paragraph 119 observed:

> "Article 5 is not a qualified right and there is no scope for holding that the denial of a person's liberty engages Article 5 but does not amount to a violation because it serves a legitimate aim and is proportionate and necessary in a democratic society."

On the other hand, it can surely be argued that an order depriving a person of liberty would not be lawful under Article 5 if it was disproportionate to the legitimate aim of the detention. In any event, an order under s.25 engages not only Article 5 but also Article 8. It must therefore comply with the principle of proportionality.

83. There is a substantial jurisprudence on the concept of proportionality and its application in domestic, EU and ECHR law. Perhaps the clearest exposition of the principles is to be found in the judgment of Lord Reed in ***Bank Mellat v HM Treasury (No.2)*** [2013] UKSC 39 at paragraphs 68 to 76. At paragraph 70, he observed:

> "proportionality is … a concept applied by the European Court of Human Rights. As the court has often stated, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."

At paragraph 71 he summarised the concept thus:

> "An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between

> the importance of the objective pursued and the value of the right intruded upon."

Having cited the relevant UK and Commonwealth case law, in particular the Canadian authority of ***R v Oakes*** [1986] 1 SCR 103, Lord Reed identified "a more clearly structured approach" to the assessment of proportionality by domestic courts in this jurisdiction under the Human Rights Act than that adopted by the ECtHR. Under that structured approach, the assessment of proportionality is broken down into four distinct elements (paragraph 74):

> "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter …. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

84. In ***Re SS (Secure Accommodation Order)*** [2014] EWHC 4436 (Fam), Hayden J applied the concept of proportionality when refusing an application for a secure accommodation order. There is also some authority from this court that an assessment of proportionality is required when considering an application under s.25. In ***Re W (A Child) (Secure Accommodation Order)*** [2016] EWCA Civ 804, Macur LJ, giving the judgment of the court, observed at paragraph 24:

> "Mr Tyler QC acknowledged that an order for secure accommodation will engage Articles 5 and 8 of the ECHR and that, notwithstanding the mandatory wording of s.25(4), which requires that the court which determined that any such criteria are satisfied 'shall make an order', any order must be necessary and proportionate to the circumstances. That is plainly right."

85. In ***Re T (A Child) (ALC Intervening)***, supra, Sir Andrew McFarlane P, at paragraph 16 of his judgment, in referring to some features of s.25, made no express reference to proportionality. He noted that:

> "The ambit within which it is possible, if at all, for the court to exercise discretion is limited as, under s.25(3) [and] s.119(3) [of SSW(W)A 2014], the court must determine whether any of the relevant criteria for keeping a child in secure accommodation are satisfied and, if so, (CA 1989, s.25(4)) the court "shall", or "must" (SSW(W)A 2014, s.119(4)), make a secure accommodation order (see ***Re M (Secure Accommodation)*** [1995] Fam 108)."

86. In *Re M (Secure Accommodation)* [2018] EWCA Civ 2707, Peter Jackson LJ, having cited the decision of Hayden J in *Re SS*, and summarised the passages from the judgments in *Re W* and *Re T* set out above, observed:

> "There is accordingly a range of authority on the place of proportionality in an application for a secure accommodation order. The central question is perhaps whether the stringent criteria within s.25 itself amount to an inbuilt proportionality check, or whether, notwithstanding the statutory wording, something more is required. This will be a question with consequences in a very small number of cases only, and this case is not one of them. Accordingly, it is not the occasion for resolving the issue of principle, and for now all that can be said is that proportionality should not become a surrogate for a general welfare assessment of the kind disapproved in *Re M* [(1995)]".

87. In this case, as set out above, Judge Hayes relied on proportionality as an alternative reason for refusing to make a s.25 order. It follows that this court must address the issue identified by Peter Jackson LJ in *Re M* (2018) but not determined by this court in that case.

88. In my judgment, an evaluation of proportionality must be carried out by the local authority before applying for an order under s.25 and by the court before granting such an order. Proportionality is one of the "relevant criteria" which must be satisfied before an order is made.

89. The ECHR, in particular Article 8, is part of the bedrock of the Children Act. As Baroness Hale observed in *Re B* [2013] UKSC 33, at paragraph 194:

> "The Act itself makes no mention of proportionality, but it was framed with the developing jurisprudence under Article 8 of the European Convention on Human Rights very much in mind. Once the Human Rights Act 1998 came into force, not only the local authority, but also the courts as public authorities, came under a duty to act compatibly with the Convention rights."

In exercising their duties and powers under s.25, local authorities and courts must comply with the ECHR and, in particular, Articles 5 and 8. Since the principle of proportionality is integral to Convention rights, it is incumbent on local authorities and courts not to apply for, or grant, orders under s.25 where, to adopt the phrase used by Lord Reed in the *Bank Mellat* case, the impact of the rights infringement is disproportionate to the likely benefit.

90. I find further support for the conclusion that proportionality is one of the relevant criteria under s.25 from the observations by other judges that secure accommodation should be regarded as a measure of last resort. In her judgment in *Re D*, in the passage from paragraph 114 cited above, Lady Black characterised s.25 as having a "'last resort' quality about it". In *Re SS*, Hayden J expressed the point eloquently:

> "The use of s.25 will very rarely be appropriate and it must always remain a measure of last resort. By this I mean not merely that the conventional options for a child in care must have been exhausted but so too must the 'unconventional', i.e. the creative alternative packages of support that resourceful social workers can devise when given time, space and, of course, finances to do so. Nor should the fact that a particular type of placement may not have worked well for the child in the past mean that it should not be tried again. Locking a child up (I make no apology for the bluntness of the language, for that is how these young people see it and, ultimately, that is what is involved) is corrosive of a young person's spirit. It sends a subliminal and unintended message that the child has done wrong which all too often will compound his problems rather than form part of a solution."

This approach is consistent with Article 37(b) of the UN Convention of the Rights of the Child which provides *inter alia* that

> "States Parties shall ensure that … the arrest, detention or imprisonment of a child shall be in conformity with the law and shall only be used as a measure of last resort and for the shortest appropriate period of time".

91. In these circumstances, it seems to me that the passage in the latest edition Guidance (quoted at paragraph 23 above), which refutes the proposition that restriction of liberty should only be considered as a last resort, is inconsistent with principle. To deprive a child of liberty in circumstances which were not a last resort would surely be disproportionate.

92. I acknowledge the strength of the suggestion put forward by Peter Jackson LJ in ***Re M*** (2018) that the "stringent criteria within s.25" – by which he meant, I infer, within s.25(1)(a) and (b) – might itself amount to an inbuilt proportionality check. It seems to me, however, that the facts of this case illustrate that there will be occasions where something more is required. If the statutory criteria in s.25(1)(a) or (b) are satisfied, but the only approved secure accommodation is located several hundred miles away from the child's home, the making of the order will inevitably amount to a greater interference with Article 8 rights than if the accommodation is close to home. In those circumstances, it seems to me that the local authority is obliged to evaluate whether the placement is proportionate before deciding whether to make an application under s.25 and the court is under the same obligation when deciding whether to grant the order.

93. I therefore conclude that proportionality is one of the "relevant criteria" which s.25(3) obliges the court to consider when hearing an application for a secure accommodation under the section.

94. In ***Re M***, Peter Jackson LJ expressed the view that this question would be relevant to only a very small number of cases. In most cases, where one or other of the conditions in s.25(1)(a) or (b) is satisfied, the child's needs are likely to be such that only a placement in an approved secure unit will provide the requisite comprehensive care and therapeutic environment. In those circumstances, the likely benefit of the placement to

the child will usually be sufficiently great to lead the court to conclude that the infringement of rights is proportionate. But so long as there continues to be a significant shortage of approved secure children's homes to accommodate young people requiring secure accommodation, there is a greater likelihood that applications under s.25 will be refused on grounds of proportionality.

95. In the light of my conclusions about proportionality, I return to the evaluation of welfare.

96. In *Re W (Care Proceedings: Functions of Court and Local Authority)* [2013] EWCA Civ 1227, this court held that, in deciding what order to make at the conclusion of care proceedings, a court is required to carry out an evaluation of the proportionality of the local authority's care plan. In his judgment (with which the other members of the court, including Sir James Munby P agreed), Ryder LJ, as he then was, at paragraph 76, expressed the principle in these terms:

> "The welfare evaluation and the question what, if any, orders are to be made engages Article 8 of the Convention and the proportionality of that intervention must be justified."

At paragraph 80, he continued:

> "The process of deciding what order is necessary involves a value judgment about the proportionality of the State's intervention to meet the risk against which the court decides there is a need for protection. In that regard, one starts with the court's findings of fact and moves on to the value judgments that are the welfare evaluation. That evaluation is the court's not the local authority's, the guardian's or indeed any other party's. It is the function of the court to come to that value judgment. It is simply not open to a local authority within proceedings to decline to accept the court's evaluation of risk, no matter how much it may disagree with the same. Furthermore, it is that evaluation which will inform the proportionality of the response which the court decides is necessary."

97. It follows from Ryder LJ's analysis that the evaluation of welfare and the assessment of proportionality are two sides of the same coin. The assessment of proportionality which the court is obliged to carry out as a public authority will inevitably involve an evaluation of welfare. In my judgment, this analysis applies equally to applications under s.25. Accordingly, the interpretation of s.25 proposed by Hoffman LJ in *Re M* – that the function of the court is to control the exercise of power by the local authority rather than to exercise an independent jurisdiction in the best interests of the child – and the approach suggested by Charles J in *S v Knowlsey* – that the court should assess welfare issues under s.25 on the basis that the local authority is the decision maker – are, in my view, incompatible with the court's duty under s.6 of the Human Rights Act. On an application under s.25, the court must carry out its own evaluation of whether the order would safeguard and promote the child's welfare. The intensity of that evaluation will depend on the facts of each case. In most cases, it is unlikely to involve a wide-ranging inquiry. The question for the court is whether, in all the circumstances,

including the need to protect the public, the proposed order would safeguard and promote the child's welfare

Relevant criteria revisited

98. Having analysed the roles played by welfare and proportionality in the decision-making process under s.25, I conclude that, in determining whether the "relevant criteria" under s.25(3) and (4) are satisfied, a court must ask the following questions.

(1) Is the child being "looked after" by a local authority, or, alternatively, does he or she fall within one of the other categories specified in regulation 7?

(2) Is the accommodation where the local authority proposes to place the child "secure accommodation", i.e. is it designed for or have as its primary purpose the restriction of liberty?

(3) Is the court satisfied (a) that (i) the child has a history of absconding and is likely to abscond from any other description of accommodation, and (ii) if he/she absconds, he/she is likely to suffer significant harm or (b) that if kept in any other description of accommodation, he/she is likely to injure himself or other persons?

(4) If the local authority is proposing to place the child in a secure children's home in England, has the accommodation been approved by the Secretary of State for use as secure accommodation? If the local authority is proposing to place the child in a children's home in Scotland, is the accommodation provided by a service which has been approved by the Scottish Ministers?

(5) Does the proposed order safeguard and promote the child's welfare?

(6) Is the order proportionate, i.e. do the benefits of the proposed placement outweigh the infringement of rights?

(In the rare circumstances of the child being aged under 13, Regulation 4 of the 1991 Regulations require that the placement must also be approved by the Secretary of State.)

99. If the relevant criteria are satisfied, s.25(4) obliges the court to make an order under the section authorising the child to be kept in secure accommodation and specifying the maximum period for which he or she may be so kept. In its submissions to this court, the ALC was rightly anxious to preserve the use of what it called "imaginative arrangements" – the arrangements characterised by Hayden J in *Re SS* as "the creative alternative packages of support" – and was concerned they would be squeezed out by too wide a definition of "secure accommodation". The recasting of the interpretation of the relevant criteria under s.25 suggested in this judgment preserves the flexible approach advocated by the ALC. If the court determining an application under s.25 is obliged to conduct an evaluation of welfare and an assessment of proportionality, and in doing so applies the principle that a secure accommodation order should always be a last resort, the court will be under an obligation to consider alternative arrangements.

100. In my view, the date at which the relevant criteria must be satisfied is the date of the hearing. I reject Mr Feehan's submission that the time for assessment as to whether the relevant criteria are satisfied is immediately before emergency protective measures are

taken. That interpretation would have the consequence that, once a court was satisfied that the criteria had been met at the point where the application under s.25 was filed, the court would be obliged at a subsequent hearing to make an order under s.25 even if the likelihood of absconding and/or significant harm had abated. Such an interpretation would be plainly contrary to the terms of s.25 itself which prohibits a child being kept in secure accommodation unless the statutory criteria are satisfied.

101. S.25 does not cover all circumstances in which it may be necessary to deprive a child of their liberty. As Lady Black observed in *Re D*, at paragraph 100:

> "The children who require help will present with all sorts of different problems, and there will be those whose care needs cannot be met unless their liberty is restricted in some way. But by no means all of these children will fall within the criteria set out in section 25(1)(a) and (b), which are the gateway to the authorisation of secure accommodation. It seems unlikely that the legislation was intended to operate in such a way as to prevent a local authority from providing such a child with the care that he or she needs, but an unduly wide interpretation of "secure accommodation" would potentially have this effect. It is possible to imagine a child who has no history, so far, of absconding, and who is not likely actually to injure himself or anyone else, so does not satisfy section 25(1)(a) or (b), but who, for other good reasons to do with his own welfare, needs to be kept in confined circumstances."

It is well established that a judge exercising the inherent jurisdiction of the court with respect to children has power to direct that the child be detained in circumstances that amounts to a deprivation of liberty. Where the local authority cannot apply under s.25 because one or more of the relevant criteria are not satisfied, it may be able to apply for leave to apply for an order depriving the child of liberty under the inherent jurisdiction if there is reasonable cause to believe that the child is likely to suffer significant harm if the order is not granted: s.100(4) Children Act. As I have already noted, the use of the inherent jurisdiction for such a purpose has recently been approved by this court in *Re T (A Child) (ALC Intervening)* [2018] EWCA Civ 2136. In *Re A-F (Children) (Restrictions on Liberty)* [2018] EWHC 138 (Fam), Sir James Munby P, in a series of test cases, set out the principles to be applied. It is unnecessary for the purposes of this appeal to revisit those principles in this judgment. Last week, Sir Andrew McFarlane, President of the Family Division, published guidance, focusing in particular on the placement under the inherent jurisdiction of children in unregistered children's homes in England and unregistered care home services in Wales.

102. Where, however, the local authority applies under s.25 and all the relevant criteria for keeping a child in "secure accommodation" under the section are satisfied, the court is required, by s.25(4), to make an order under that section authorising the child to be kept in such accommodation. To exercise the inherent jurisdiction in such circumstances would cut across the statutory scheme

Conclusions

103. Having considered the legal principles, I turn back to the present appeal.

104. I have considerable sympathy for the judge. S.25 is not a straightforward statutory provision. As Lady Black acknowledged in ***Re D***, not all secure accommodation is readily recognisable as such. The judge was plainly and understandably concerned at the proposal to move the child so far away from home when there were some signs that she had settled down slightly at N House. He had to make a decision immediately and deliver a judgment ex tempore. In this court, we have the advantage of time for reflection and analysis which is often not available to a judge sitting at first instance.

105. I have, however, concluded that the decision was wrong and this appeal must be allowed.

106. The principal reason for the judge's decision to refuse the application was an erroneous reading of s.25, and in particular the meaning of "secure accommodation". He proceeded on the basis that the accommodation in N House was not "secure" accommodation and that it therefore fell into the category of "any other description of accommodation". He found that B was not likely to abscond from N House or injure herself while staying there and that, accordingly, neither of the conditions in s.25(1)(a) or (b) was satisfied.

107. As Lady Black acknowledged in ***Re D***, there are cases where it is not easy to determine whether accommodation is being provided for the purpose of restricting liberty. This is just such a case. In my judgment, however, the judge was wrong to proceed on the basis that N House was not "secure accommodation". B was initially admitted to N House over the weekend of 17 to 19 May as a respite placement following the incidents when she had attempted to harm herself and assaulted other residents and staff at her residential home. The local authority then decided that she should remain at N House for the time being, that she would be the only resident at the property, and that her liberty would be restricted. The reason for restricting her liberty, and the primary purpose for providing B with accommodation at N House, was to prevent her absconding and thereby suffering harm and also to prevent her causing harm to herself and to others. N House was originally intended as a property for up to 5 older teenagers but the agency that owned the property agreed that it could be used to accommodate B alone so that her liberty could be restricted. Although N House was not designed as secure accommodation, it became secure accommodation for B within the meaning of s.25(1) because of the use to which it was put in her case. The judge was therefore wrong to proceed on the basis that N House fell into the category of "any other description of accommodation".

108. The judge attached importance to the fact that B had not absconded from N House between 24 May and the date of the hearing on 10 June. He was "far from satisfied" that she was likely to abscond again. He was persuaded by submissions that "the local authority has it within its power to put in place arrangements addressing the situation at school which would mean that that part of the test is not met …." There was, however, no evidence about any such arrangements. The evidence adduced by the local authority showed that, on the last occasion when B had attended school, she had absconded, visited the family home and assaulted her stepfather. The level of absconding had only abated after she stopped going to school and was detained at N House under a regime that plainly satisfied the acid test for deprivation of liberty. The evidence clearly demonstrated that, unless she was detained in secure accommodation – either at N House or another establishment – she was likely to abscond and injure herself or others.

109. It follows, therefore, that the judge's analysis of whether the conditions in s.25(1) were satisfied was flawed.

110. The alternative reason given by the judge for his decision was that, if he was permitted to take proportionality into account, it would "very strongly come down in favour of the decision", having regard to the progress B had made at N House. For the reasons set out above, he was, in my judgment, entitled – indeed, obliged – to carry out an assessment of proportionality, and also to evaluate the impact of the proposed order on the child's welfare. But the evaluation of proportionality and welfare required the judge to look carefully at the local authority's plan and the advantages as well as the disadvantages of its proposal to place B in an approved secure unit. In my judgment, the judge failed to carry out such an evaluation in this case. I acknowledge that the judge was impeded by the lack of clear guidance as to whether an evaluation of proportionality was required and, if so, what it entailed. His assessment of proportionality was brief because he had concluded that the s.25(1) conditions were not met and, in the light of the uncertainty in the case law, he was cautious about whether proportionality could be brought into account. In his brief analysis of this issue, the judge identified the progress which B had made at N House, but he did not sufficiently consider the clear evidence, given not only by the local authority social worker but also by the service manager at N House, that the regime there would not provide B with the comprehensive therapeutic support she needed. He failed to take into account the full benefits of the proposed placement at the approved secure unit. His evaluation of proportionality was therefore flawed.

111. It follows that, if my Lords agree, this appeal must be allowed and the judge's decision to refuse the application under s.25 set aside.

112. Over four months have now passed since the judge's decision. In some respects, B's circumstances have changed. Her mother and stepfather have seen encouraging progress while she has remained at N House. But the local authority remains concerned that, without comprehensive therapeutic support, she will remain at risk. The local authority must therefore decide whether it wishes to pursue its application for a secure accommodation order. The placement at the secure unit on the South coast is no longer available. If the local authority is still of the view that B should be securely accommodated and has identified a suitable placement in an approved children's home, it will no doubt pursue its application under s.25. The care proceedings are listed for a case management hearing which has now been adjourned to December 2019. At that hearing, the local authority should indicate whether it wishes to pursue its application under s.25. If it does, the court will be able to give appropriate directions in relation to that application alongside directions in the care proceedings.

113. I have had the benefit of reading in draft the judgment to be delivered by Green LJ with which I agree.

LORD JUSTICE GREEN

114. I agree with the judgment and the analysis of Baker LJ and would also allow the appeal and I also conclude that the decision of the judge to refuse the application under section 25 must be set aside. The facts relating to B have significantly changed since the hearing of this appeal, whose position is now being reconsidered by the local authority. In these circumstances the sensible and practical course is for this court simply to leave

it to the local authority to take a fresh decision bearing in mind the circumstances as they presently stand.

115. I address only one issue given its potential significance and the lack of certainty that has surrounded this point in previous case law. This concerns the application of the proportionality test to section 25. As to this I agree with the analysis of Baker LJ and would add the following observations.

116. First, under section 6 Human Rights Act 1998 ("HRA") courts are public authorities and are, themselves, bound to apply the Act and therefore the principles in the Convention (see to this effect per Baroness Hale in ***Re B*** [2015] UKSC 33 at paragraph [194]). To the extent that the judgment of Hoffman LJ in ***Re M*** [1995] Fam 108 (set out extensively in the judgment of Baker LJ above at paragraphs [65ff]), suggests that the role of the judge is to put him/her self in the position of the local authority and not to form an independent view, I would respectfully disagree. That judgment whilst post-dating the adherence of the United Kingdom to the Convention predates the HRA and the duty in section 6 therein imposed upon courts to arrive at an independent judgment on the compatibility of a public decision with human rights.

117. Second, both Articles 5 and 8 are capable of applying to the deprivation of liberty of a person, including of course a child. Indeed, whenever a person is deprived of liberty (thereby engaging Article 5) that executive act will almost inevitably engage that person's private life rights under Article 8. When an authority deprives someone of their liberty private life is by its nature curtailed. Lady Hale in ***Re D (A Child)*** [2019] UKSC 42 (***Re D***) at paragraph [3] made a similar point about the combined effect of Articles 5 and 8 as they applied to the rights of a child and those of parents.

118. Third, it has been suggested that Article 5 is not a "*qualified*" right and that this might suggest that there is no scope for a proportionality test: see per Lady Arden in ***Re D*** (ibid) 42 at paragraph [119] cited by Baker LJ above at paragraph [82]. Article 5 is not a "*qualified*" right in the limited sense that by its express language Article 5 is not said to be subject to that which is "*necessary in a democratic society*", as Article 8 is. But that is, in my view, a far cry from saying that a decision under section 25 to deprive a person of their liberty need not be taken in a proportionate manner. Two hypothetical illustrations make the point. It would surely be disproportionate to deprive a child of his/her liberty for the educational purpose set out in Article 5(1)(d) simply because the child failed to complete homework from time to time. And equally it would surely be disproportionate under Article 5(1)(e) in relation to lawful detention of persons of unsound mind to remove a child from a caring and loving home and place that child in a secure and highly restrictive unit simply because, for instance, the child had a manageable mental health problem. The Children Act, and subordinate measures made under and in implementation of it, must (on ordinary principles of statutory interpretation) be construed to the greatest degree possible to be consistent with the HRA and the Convention and this includes the proportionality test therein.

119. Fourth, the proportionality test is not a rigid doctrine and is to be applied flexibly. It does not impose any sort of overcomplicated straitjacket. Courts should eschew an "*…excessively schematic approach since the jurisprudence indicates that the principle of proportionality is flexible in its application*": see per Lords Reed and Toulson in ***Lumsdon v Legal Service Board*** [2015] UKSC 41 ("***Lumsdon***") at paragraph [34]. I would not however wish to attempt to list the sorts of factors that might be considered

in a particular case, for fear of giving the impression that there was a limit to such criteria. I would add however that, like Baker LJ, I do not see how the fact that section 25 is in part a derogation from the paramountcy principle set out in section 1 means that the welfare of the child does not *still* loom large in the analysis. I agree with his analysis that section 25 as a derogation from the fundamental principle of paramountcy in section 1 should be construed to do minimum damage to that principle. In this way the paramountcy principle is given its proper scope and is mitigated and adjusted only to the extent needed to ensure adherence to the requirements of section 25. This is also how I read the nub of the observation of Lady Black on this point in ***Re D*** (ibid) at paragraph [101].

120. Fifth, it follows in my view, and again as Baker LJ also observes, that when a local authority takes a decision about a child under section 25 there must be some proper measure of proportionality as between the purpose or objective behind the proposed deprivation and both (a) the very fact of deprivation (ie the decision to place the child in secure conditions in the first place) *and* (b) if such a decision is properly taken (ie is proportionate) the nature and degree/extent of the deprivation (ie the extent of the actual restrictions imposed upon the child in secure conditions).

121. Sixth, in relation to the argument raised in argument that in effect the courts should defer to the judgment call of the local authority, this is too broad and sweeping a proposition. It is the express duty of a court under the HRA itself to ensure observance with human rights. A court cannot delegate that function to some other public body. It must form its own conclusion. This does not, however, mean that a court will attach no weight to the decision of a public body expressly charged with forming a complex, multifaceted, judgment about the welfare of a child and any competing public interest considerations and which has extensive experience in this balancing exercise. As was emphasised in ***Lumsdon*** (ibid) the intensity of the review to be conducted by the Court is fact and context specific and it will be the particular facts surrounding a case that will govern the approach that a court takes, and not some pre-existing presumption or rule. For instance, the position of a vulnerable child might be highly changeable and volatile and the circumstances pertaining when the local authority took is decision might not therefore apply some weeks or months later when the court comes to consider the matter. The Court could not in such a case endorse the decision of the authority as lawful under Articles 5 and 8, *if*, in the light of the facts as *now* known, the conclusion would or might be different. But by the same token if the facts have not changed and it is evident to the court that when the relevant decision was taken the authority addressed all relevant matters and did not take into account irrelevant matters and brought its experience properly to bear upon the case, then the court might well conclude that it is was proper to accord that decision a good deal of weight.

LORD JUSTICE FLOYD

122. I agree with both judgments.