



Neutral Citation Number: [2019] EWHC 2017 (Fam)

Case No: ZE19C00054

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2019

Before:

THE HONOURABLE MR JUSTICE MACDONALD

Between:

London Borough of Barking & Dagenham
- and -

Applicant

A
-and-

First
Respondent

N
(By his Children's Guardian)

Second
Respondent

Ms Allison Munroe (instructed by the **Local Authority Solicitor**) for the **Applicant**
Mr Philip Squire (instructed by **Milner Ellege Solicitors**) for the **First Respondent**
Ms Rebekah Wilson (instructed by **Edwards Duthie Solicitors**) for the **Second Respondent**

Hearing dates: 23, 24 and 25 July 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with N, born on 7 August 2007 and now aged 11 years old. The mother of N is A. N's father is deceased. The application is brought by the London Borough of Barking & Dagenham, which local authority seeks a final care order and the continuation of a declaration that the deprivation of liberty resulting from N's current therapeutic residential placement is lawful for the purposes of Art 5 of the ECHR. The mother opposes the applications and seeks the return of N to her care. The application of the local authority is supported by the Children's Guardian.
2. In determining this matter, I have had the benefit of reading the bundle of documents filed with the court. I have heard oral evidence from Ms Nicola Clark, the home manager at N's placement, from Dr Kennedy, consultant child and adolescent psychiatrist, from Ms Richards, allocated social worker, from the mother and from the Children's Guardian. I heard oral closing submissions from Ms Munroe on behalf of the local authority, from Mr Squire on behalf of the mother and Ms Wilson on behalf of N on the instruction of the Children's Guardian.
3. Ahead of this hearing there was the prospect of the court being invited to make a declaration that N's human rights have been breached by reason of an incident of physical restraint of N, which incident also involved paramedics and the police. However, at the outset of the hearing, it was unclear against which public authority such relief was sought. In the circumstances, I was satisfied that it would be disproportionate to delay this final hearing whilst those issues were clarified and that any application for a declaration should be considered in separate proceedings once any such claim had been properly formulated and pleaded against the relevant public authority. In the circumstances, the only issues before the court are those concerning N's best interests within the context of proceedings under the Children Act 1989 and the inherent jurisdiction of the High Court. That, of course, does not preclude this court commenting where appropriate on the incident of restraint in question within that welfare context on the basis of the unchallenged evidence before the court.
4. With respect to the manner in which this hearing has been conducted, at the outset of the hearing the mother indicated that she was content for the matter to be dealt with by way of limited evidence concentrating on the *current* position for N. In the circumstances, there has been no substantive dispute before the court in respect of historical matters. Within this context, Mr Squire has presented the mother's case with appropriate economy and has said all that can be said on her behalf having regard to the evidence in this matter.

BACKGROUND AND EVIDENCE

5. The background to this matter can be stated relatively shortly. Prior to 27 February 2019, on which date an interim care order was granted, N lived with his mother. N has an older brother, E, who was born in November 1998. In 2009 E and N were made the subject of child protection plans due to what was said to be the volatile relationship between the mother and E and the use of physical chastisement against E by the mother, which physical chastisement was witnessed by N. E was considered to

be beyond parental control and, following the police exercising powers of police protection, was placed in foster care. He now lives independently.

6. On the unchallenged evidence before the court it is plain that, historically, the mother struggled also to meet N's needs. From 2014 onwards it was clear that the mother was finding it increasingly difficult to manage N's behaviour. Concerns regarding N's behaviour and the mother's capacity to manage the same continued through 2016. In June 2016 he had to change schools as his old school was no longer able to manage his behaviour. From early 2017 he became physically aggressive to others and made verbal threats to kill himself. N at times became extremely verbally abusive, on one occasion threatening to spray everyone with acid. N also directed abuse to his mother, who continued to struggle to deal with his behaviour. In early 2018 the mother informed a Core Group Meeting that N was controlling and consistently threatening. N was noted to deliberately challenge the mother. The mother was not able to put in place and enforce boundaries for N, resulting at times on her exhibiting aggressive behaviour towards him. He frequently stayed up all night playing video games online.
7. Within this context, during the pre-proceedings stage of this case the local authority commissioned reports from Dr Castle, an adult psychiatrist and Dr Parsons, an adult psychologist, in respect of the mother, from Dr Kennedy, a child and adolescent psychiatrist, in respect of N, and from Kay-Marie Taylor-Duke, independent social worker, in respect of the parenting by the mother of N.
8. Dr Castle reported on 23 May 2018. He considered that the mother labours under a cognitive disability and a generalised anxiety disorder and recurrent depression. He considered that were the mother to comply with treatment designed to address these issues there would be a significant improvement in her conditions. Dr Castle made clear that a detailed assessment of the mother was properly within the remit of a psychologist.
9. Within this context, Dr Parsons, reported on the mother's psychological presentation on 18 June 2018. I pause to note at this point that Dr Parsons considered that the mother had capacity to conduct proceedings but that she would need assistance when in court to understand the proceedings. Within this context Dr Parson made a number of recommendations in the body of his report and this court has the benefit of a report from Communicourt recommending that the mother have the services of an intermediary during this hearing, which she has done. Accordingly, all parties and the court were aware of the proper approach in this case to ensure that the mother understood the proceedings as they unfolded at this hearing. Regular breaks were taken as requested by the mother. At all times the court has sought to give effect to FPR 2010 r 1.1(2)(c) (the requirement to ensure that all parties are on an equal footing) and, as I have noted above, FPR 2010 Part 3A (Vulnerable Persons: Participation in Proceedings and Giving Evidence).
10. With respect to the substantive issues in this case, Dr Parsons considered that the mother suffered from a mild learning disability and is in the 'extremely low' range of intellectual ability. He concurred with Dr Castle that the mother presented with depressive symptoms. Dr Parsons recommended solution focused therapy and considered that effective change could be seen within two years if the mother engaged effectively with treatment. Dr Parsons further identified that the mother demonstrates

features of a Schizoid Personality Disorder, avoids social interactions and is, in consequence, socially isolated. Dr Parsons did not concur with Dr Castles view that it is possible that the mother suffers from ADHD.

11. With respect to the mother's care of N, Dr Parsons considered that the mother's cognitive difficulties result in her being overwhelmed by N's challenging behaviour and that N is a child who requires better than a 'good enough' standard of care from his mother. However, Dr Parsons also observed as follows:

“When an individual has a mild learning disability it is not possible to extrapolate their actual parenting abilities from a psychological assessment but, rather, an actual practical assessment of parenting should be undertaken. Such an assessment needs to be undertaken by an individual who is skilled in working with people with mild learning disabilities and should use a structured assessment framework, such as the PAMS assessment framework. I note that an independent social worker assessment is in fact underway but, in my view, it is important that the recommendations I have made above, both in terms of the PAMS assessment and the methods of working with [the mother] are followed.”

12. The independent social worker referred to by Dr Parsons, Ms Taylor-Duke, initially reported on 20 July 2018. Her assessment was carried out having seen the report of Dr Parsons. The assessment confirms that Ms Taylor-Duke undertook the PAMS 'Parent Questionnaire' with the mother and applied the other recommendations made by Dr Parsons. Ms Taylor-Duke confirmed that the mother's parenting difficulties are related to her cognitive deficits. Ms Taylor-Duke considered that the mother is able to meet N's basic care needs but her ability to meet N's emotional and development needs is affected by her learning difficulties, depression and high levels of anxiety. She considered that the mother required support for her own mental health needs in order to enable to support and parent N consistently well. Ms Taylor-Duke recommended that residential placement be identified for N.
13. By June 2018 N's behaviour remained significantly problematic. He continued to be angry towards his mother and threatened to rape her. In October 2018 N was excluded from his school for biting a teacher. Significant input into the household was provided by the local authority. However, even with this extensive support, which is detailed in the unchallenged evidence of the Family Support Worker, Jennifer Mead, the mother was not able to cope with parenting N.
14. In November 2018 N met with Dr Kennedy. As Dr Kennedy articulated during the course of his brief oral evidence, N is a child with very complex needs. Dr Kennedy first reported in this case on 19 November 2018. He identified that, in his opinion, N is suffering from a longstanding reactive attachment disorder consequent on inconsistent parenting over a number of years from his mother. Dr Kennedy further considered that N is suffering from oppositional defiance disorder, which is again linked to the quality of the parenting he has received from his mother. Dr Kennedy further identified that N demonstrates severe ADHD. Dr Kennedy considered that the result of these conditions is that N has difficulty in regulating his emotions, difficulty in sustaining trusting relationships and displays contradictory social responses. As Dr Kennedy noted in oral evidence, N has also suffered two significant bereavements and has been removed from the care of his mother. He has also been diagnosed as

suffering from epilepsy. Within this context, Dr Kennedy considered that N requires ‘compensatory parenting’. Dr Kennedy recommended that N be provided with a safe, containing environment and that a foster placement would not meet his needs. It should be noted that in oral evidence, Dr Kennedy considered that *any* parent, no matter how competent, would struggle effectively to parent N given the extent and complexity of his needs.

15. The local authority issued care proceedings on 31 January 2019. Within the context of the recommendations made by Ms Taylor-Duke and Dr Kennedy, a specialist therapeutic residential placement was identified at a facility called LCR. N was placed at LCR following the hearing on 27 February 2019. Whilst the placement is independent of the local authority, the local authority provided additional in house staff to assist with management at this placement. With respect to the progress of the placement I heard oral evidence from Ms Clark, the home manager at LCR and who has regular contact with N in this context. She has filed a statement with the court dated 29 April 2019.
16. It is not disputed that LCR, initially, had to work hard to manage N’s behaviour and it was clear from Ms Clark’s written and oral evidence that this represented a steep learning curve, during which ascent some difficult lessons were learnt. N’s behaviour, which included the use of weapons, threats or attempts to injure staff, verbal abuse including racial abuse towards staff and self-harm through headbanging and biting, required the use of physical intervention by LCR in the form of holds on 1, 4, 6, 12, 14 and 28 April 2019. One incident of physical intervention, albeit taking place outside the placement, has in particular caused the professionals in this case very real concern.
17. On 8 March 2019 plans for N to visit possible school provision became disrupted and uncertain, heightening N’s anxieties. As a result, his behaviour meant that he had be the subject of holds within the placement on the morning of 8 March 2019. Four holds were applied, of 5 minutes duration, 4 minutes duration, 7 minutes duration and 20 minutes duration (the maximum permitted). A decision was taken to proceed with the school visit. However, once at the school site N’s behaviour escalated considerably and further holds were applied. Whilst in a hold N suffered a tonic clonic seizure and paramedics were called. The paramedics arrived at a time when N was in an extremely heightened state of emotion and shouting, swearing and making negative personal comments towards staff. N repeatedly tried to damage property and kicked and punched the staff who tried to prevent him from leaving the area, he having kicked open locked doors, and spat in the faces of staff. As a result the paramedics called for support from the police and from additional paramedics.
18. Whilst efforts were made to de-escalate the situation this was not possible (in part, Ms Clark surmises, by reason of the fact that N had only been in placement nine days at this point, the further new environment for N that the school site represented and the number of new faces and the presence of medical and police officers). In the circumstances, whilst N was placed in a hold the Police also applied handcuffs and leg restraints to N (the police contending that this was necessary to prevent injury to themselves and staff in circumstances where N was physically lashing and kicking out) and carried him to an ambulance, in which he also had to be held at times on the way to hospital. From the content of the statements they have provided or these proceedings, the police officers plainly found the incident a trying and frustrating one

in circumstances where they considered that it was not their job to deal with this situation and took the view that the professionals involved were, in any event, mishandling the incident. Within this context, one of the officers concedes that on one occasion he swore when addressing N about the need for him to calm down. Once at hospital N agreed to walk into the building and the leg restraints were removed but the handcuffs remained on. At hospital N calmed to the point where the remaining restraints were removed and he returned to the placement.

19. In the circumstances, whilst within the home Ms Clark made clear that the staff at LCR are trained in, and utilise the STRIDE method of behaviour management (which, in the context of holds or other physical restraint, aims to allow movement by the child within the context of the hold or restraint, seeks to adopt the least restrictive approach, is regulated by the Children's Home Regulations 2015 and is accredited) during the incident at the school site on 8 March 2019 it is plain that a high level of restraint was applied, including at one stage the use by the police of handcuffs and leg restraints. The latter caused N particular distress in circumstances where, for reasons yet to be determined, he has an acute aversion to people touching his legs in any way. Whilst for the reasons I have set out above I make clear that I make no findings of fact in relation to this incident, it will nonetheless be plain that this incident is a matter of significant concern. I will address this further below.
20. Within the foregoing context, and given continuing behavioural issues in the placement, on 28 March 2019 LCR gave the local authority 28 days' notice in respect of N's placement in circumstances where the placement considered that it could no longer guarantee the safety of N nor the safety of those around him, or maintain the efficacy of LCR as a therapeutic placement for all of the children placed there.
21. However, and following a change in his medication on 30 March 2019, N's behaviour became more settled. He began to demonstrate an ability to reflect on his behaviour. Less interventions in the form of holds or restraint were required. He engaged with staff more effectively and managed face to face contacts with his mother. In circumstances where there were signs that, notwithstanding the difficulties in managing N, he was, in relative terms, making progress and becoming more settled, at a hearing on 17 April 2019 it was agreed between the local authority and LCR that N could remain in the placement until 14 June 2019, subject to the local authority continuing to provide additional staff. The strong impression I was left with is that this reassuring turn of events was down to Ms Clark, the home manager, and Ms Richards, the allocated social worker (who Ms Clark confirmed attended the placement on a regular basis), standing by N, continuing to work with him and advocating on his behalf when other considerations were, perhaps understandably prior to that point, becoming persuasive for more senior managers at LCR.
22. Within this context, the current position in respect of N's placement at LCR is significantly more positive than it was at the end of March 2019, to the extent that Ms Clark confirmed during her oral evidence that LCR has now withdrawn its notice in respect of that placement and is content to continue to care for N in the longer term.
23. Ms Clark was an *extremely* impressive witness. She is clearly dedicated to N's welfare and spoke confidently and in detail with great authority on his welfare needs and the plan for meeting those needs in the future by the provision of further input, including therapeutic input. Ms Clark made clear in her statement and in oral

evidence that, within the context of an approach to caring for N that utilises Maslow's hierarchy of needs, the following progress by N in particular has been noted within the placement:

- i) Following the change in his medication N became more settled and appears more at rest and happier, was able better to take instruction and was more accepting of those instructions.
 - ii) There marked progress in reducing the number of holds and restraints, from twenty-one in March 2019 down to ten in April, four in May, two in June and one so far in July.
 - iii) N has been able to start attending secondary school during the mornings on Mondays, Tuesdays and Thursdays and has only been excluded on two occasions.
 - iv) On Wednesdays and Fridays N has been attending a football academy at a Championship football club and has consistently attended well.
 - v) N has begun to demonstrate the ability to form friendships, show empathy and to regulate his emotions.
24. Within this context, whilst there remains a high level of risk requiring the present supervisory regime at LCR to continue (Ms Clark was clear that, for example, she would still not consider it safe to take N outside the home on her own), Ms Clark stated, and I accept, that N has made substantial progress. As I have noted, within this context agreement has now been reached between the local authority and LCR that N can remain in his placement. The local authority and the placement will continue to work together to ensure the next stage of therapeutic input is made available to N to assist him in making further progress within the context of his particular needs. Ms Clark was clear, when asked by Mr Squire whether N expresses a wish to return home to the care of his mother, that whilst he did so at times at the outset of the placement, and sometimes expresses a wish to return home to collect certain electronic items, he now speaks in a manner that suggests he contemplates his future at LCR.
25. Within the foregoing context, whilst in his addendum report in May 2019 Dr Kennedy expressed a degree of justifiable pessimism in noting that N's presentation course remained very challenging indeed, during his oral evidence Dr Kennedy noted the progress made by N and considered that this pessimism had not been borne out. However, Dr Kennedy made clear that:
- i) N remains a child with extremely complex needs that require a co-ordinated approach by professionals, including close liaison between the psychologist responsible for therapeutic input and the neurologist responsible for managing N's epilepsy.
 - ii) N continues to require a settled environment in which he is provided with specialist care.
 - iii) Absent such specialist care in a settled environment, and having regard to his home context, N would be at very high risk of exploitation, involvement in

organised criminal groups and dangerous, and possibly fatal, situations in the community.

- iv) In circumstances where it is proving difficult to manage contact for the period of one hour, at the present time the mother is plainly not capable of meeting N's complex needs. A return home at this stage would put at risk the progress N has begun to make.
 - v) The next stage for N at LCR should be therapeutic input, which input is "absolutely necessary" and constitutes the "crucial next step".
26. Within this context, I note that in her addendum report dated 29 May 2019, the contents of which were not challenged, Ms Taylor-Duke observed as follows with respect to the capacity of the mother to meet N's needs:

"4.5 In my opinion [the mother] is not able to provide a good enough level of overall care to N that would keep him safe from harm and meet all of his presenting and developing needs now or going forward till he reaches his majority.

4.6 In my view it is likely that N's behaviour, if he was in the community, would continue to be too complex and too challenging for [the mother] to manage alone. I concur with Consultant Child and Adolescent Psychiatrist Dr Kenny (*sic*), who reports that [the mother] struggles through her own learning disability to understand N's complex needs and further, that her learning disability '*complicated by depression and significant anxiety means that she is unable to provide N with what he needs, which is stable calm and firm parenting*'.

4.7 N's physical outbursts since his removal from home suggest N is likely to be physically too much of a challenge to [the mother], notwithstanding more so as he matures."

27. Within the foregoing context, the allocated social worker Ms Richards gave clear and compelling evidence that the care plan advanced by the local authority, for N to be placed at LCR under the auspices of a final care order and a declaration regarding his deprivation of liberty to enable him to benefit from therapeutic parenting, is manifestly in his best interests. Ms Richards was also an *extremely* impressive witness who has worked immensely hard to ensure that N is maintained in a therapeutic placement that is capable of meeting his needs. In particular, Ms Richards showed an admirable and impressive ability to see past N's superficial presentation to the messages that N is endeavouring to communicate through his challenging behaviour. Within this context, during her oral evidence Ms Richards confirmed her view that N has made considerable progress, including being able to demonstrate remorse and a developing ability to articulate what he feels and wants in a manner that does not involve anger or aggression. Within this context, Ms Richards stated it is now *vital* that N remain at LCR as that placement has the skills and resources to meet his complex needs. She was clear in her view that it would not be in N's best interests to return to the care of his mother at this time. Ms Richards confirmed that she will remain N's social worker notwithstanding the conclusion of these proceedings. Finally in respect of the work of Ms Richards, I pause to note also that

her diligent approach, and that of her team, also resulted in the necessary expert evidence in this case being secured in the proper format during the pre-proceedings stage of this case and in these complex proceedings being concluded within the statutory time limit set by s 32(1) of the Children Act 1989.

28. The mother has filed a statement of evidence dated 26 February 2019. In that statement she contends that N would not be at risk of harm in her care and that, with support, she is capable of providing for all of N's needs. The mother also gave brief oral evidence to the court. The court was rearranged so that I was able to sit at the same level as the mother as she found the prospect of going into the witness box too intimidating. She answered some questions put to her by Mr Squire and answered some questions from me. I did not require Ms Munroe or Ms Wilson to cross examine the mother.
29. The mother told me that she is very good with paying her bills and with taking her medication. She told me that she is well able to get herself dressed and that, whilst she sometimes has difficulties with letters and forms, her neighbours assist her with this. The mother made clear to me that she would like N now to come home. She considers that she will be able, with support from the local authority to get him to school and to appointments, to care for N and to meet his needs by "carrying on" what LCR are doing with N and "following that through so he does not go off the rails". Despite the considerable distance and the difficulty in getting there, the mother diligently attends contact with N, albeit that the duration of each contact has recently been reduced at the mother's instigation.
30. The mother's evidence was extremely poignant. Her manifest limitations as described by Dr Carter and Dr Parsons were clear to the court, as was her lack of insight into the complexity of the task that parenting N represents. That said, it is plain that the mother loves her son very much. She was also able to perceive the benefits that are accruing to N from his placement at LCR and the mother had no concerns regarding the care being provided to him there. She told me that the case made her emotional but that "whatever the outcome I know it's best for N". Within this context, the dilemma facing the mother was articulated simply when she told the court that "I know he is getting the best [at LCR] but I'd like him to come home".
31. Finally, with respect to the evidence, the court has had the benefit of a final analysis, and oral evidence from the Children's Guardian. In her final analysis, and subject to articulating concerns regarding the level of physical restraint used in respect of N historically, the Children's Guardian makes clear as follows:

"Given N's high level of need, the most realistic option being considered at this stage is for him to remain in residential care. This will ensure he has the best chance of necessary care, supervision and therapeutic support to be safe, to learn different patterns of behaviour, different ways to express his emotions and to engage more fully in his education."
32. With respect to the question of contact, the Children's Guardian expressed some concerns during the course of her oral evidence with respect to the baseline level of contact set out in the amended care plan of one hour per month. The Children's Guardian was clear that the nature and quantum of contact must be led by N's evolving needs. However, whilst making clear that this may require a reduction in

contact in the future (for example, as a result of the demands of therapeutic intervention) she could identify no welfare reason why the current level of contact of one hour every fortnight should not continue at present.

RELEVANT LAW

33. There is no dispute in this case that the threshold for making orders under Part IV of the Children Act 1989 is made out. In the circumstances, the court has a discretion as to whether to make such orders. In exercising that discretion, the court must consider, pursuant to the Children Act 1989 s 1, the welfare of the child as its paramount consideration and to (a) the ascertainable wishes and feelings of the child considered in light of his or her age and understanding, (b) the child's physical, education and emotional needs, (c) the likely effect on the child of a change of circumstances, (d) the child's age, sex, background and any characteristics the court considers relevant, (e) any harm the child has suffered, (f) how capable each of the parents is of meeting the child's needs and (g) the range of powers available to the court. The court must not make an order unless it considers that doing so is better for the child than making no order at all. Pursuant to s 34(11) of the 1989 Act, the court must also consider the arrangements for contact and invite the parties to comment on those arrangements.
34. Where there are competing options for the child's care, the court must undertake a process of comparative welfare analysis of the competing options (see *Re G (A Child)* [2013] EWCA Civ 965 at [49]-[50] and *Re B-S (Children)* [2013] EWCA Civ 1146 at [44]). Within this context, in determining which of the competing options in respect of the child's care is in his best interests, having identified the child's welfare needs it is necessary then to undertake an evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to each of the child's welfare, having regard to the principle of proportionality under Art 8(2) of the ECHR.
35. In this case, N is eleven years old. When considering a child's wishes and feelings, the wishes and feelings of a mature child do not carry any presumption of precedence over any of the other factors in the welfare checklist (*Re P-J* [2014] 2 FLR 27). The child's preference is only one factor in the case and the court is not bound to follow it. The weight to be attached to the child's wishes and feelings will depend on the particular circumstances of each case. In particular, having regard to the words of section 1(3)(a), it is important in every case that the question of the weight to be given to the child's wishes and feelings is evaluated by reference to the child's 'age and understanding'. Within this context, and on the face of it, the older the child the more influential will be his or her views in the decision-making process. However, in the end the decision is that of the court and not of the child (*Re P (Minors)(Wardship: Care and Control)* [1992] 2 FCR 681). Once again, it is important to recall in this context that children's best interests are the court's paramount consideration.
36. With respect to the question of deprivation of liberty, in *Storck v Germany* (2006) 43 EHRR 6 the European Court of Human Rights established three broad elements comprising a deprivation of liberty for the purposes of Art 5(1) of the ECHR, namely (a) an objective element of confinement to a certain limited place for a not negligible period of time, (b) a subjective element of absence of consent to that confinement and (c) the confinement imputable to the State. Only where all three components are present is there a deprivation of liberty which engages Art 5 of the ECHR. Within this

context, in *Cheshire West and Chester v P* [2014] AC 896 the Supreme Court articulated an ‘acid test’ of whether a person who lacks capacity is deprived of their liberty, namely (a) the person is unable to consent to the deprivation of their liberty, (b) the person is subject to continuous supervision and control and (c) the person is not free to leave.

37. In circumstances where it is accepted the first limb of the “acid test” does not require examination in the particular circumstances of this case, with respect to the application of the second and third limbs of the test to children and young people, in *Re RD (Deprivation or Restriction of Liberty)* [2018] EWFC 47 Cobb J, having reviewed the extensive case law, summarised the position as follows:
- i) 'Free to leave' does not mean leaving for the purpose of some trip or outing approved by those managing the institution; it means leaving in the sense of removing herself permanently in order to live where and with whom she chooses (*Re A-F* [2018] EWHC 138 (Fam) at [14], repeating comments made in *JE v DE* [2006] EWHC 3459 (Fam) at [115], which had been cited with approval in *Re D (A Child)* [2017] EWCA Civ 1695, [22]).
 - ii) It is accepted wisdom that a typical fourteen or fifteen-year old is *not* free to leave her home (*Re A-F* at [31](i)).
 - iii) The terms 'complete' or 'constant' define 'supervision' and 'control' as indicating something like 'total', 'unremitting', 'thorough', and/or 'unqualified' (*Re RD (Deprivation or Restriction of Liberty)* at [31]).
 - iv) It does not matter whether the object is to protect, treat or care in some way for the person taken into confinement (*Cheshire West and Chester v P* at [28]).
 - v) The comparative benevolence of living arrangements should not blind the court to their essential character if indeed those arrangements constitute a deprivation of liberty (*Cheshire West and Chester v P* at [35]).
 - vi) What it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities (*Cheshire West and Chester v P* at [46]).
 - vii) The person's compliance or lack of objection, the relative normality of the placement (whatever the comparison made) and the reason or purpose behind a particular placement are not relevant factors (*Cheshire West and Chester v P* at [50]).
 - viii) The distinction between deprivation and restriction is a matter of "degree or intensity" and “in the end, it is the constraints that matter” (*Cheshire West and Chester v P* at [56]).
 - ix) The question whether a child is restricted as a matter of fact is to be determined by comparing the extent of the child’s actual freedom with someone of the child’s age and station whose freedom is not limited (*Cheshire West and Chester v P* at [77]).

- x) The sensible and humane comparison to be drawn is that between the situation of the child with the ordinary lives which young people of their ages might live at home with their families (*Cheshire West and Chester v P* at [47]).
 - xi) The 'acid test' has to be directly applied on each case to the circumstances of the individual under review. Where that individual is a child or young person, particular considerations apply (*Re A-F* at [30]).
38. In *Guzzardi v Italy* [1980] 3 EHRR 333 the ECtHR observed that to determine whether someone has been “deprived of his liberty” within the meaning of Art 5, the starting point must be his or her concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.

DISCUSSION

39. Having considered the totality of the evidence in this matter, and listened carefully to the submissions made by counsel on behalf of the parties, I am entirely satisfied that it is in N’s best interests to grant a final care order on the basis of the amended final care plan before the court, which care plan I approve. Further, I am satisfied that it is appropriate to grant a declaration declaring the deprivation of liberty that results from N’s current placement to be lawful for the purposes of Art 5 of the ECHR. My reasons for so concluding are as follows.
40. There is no dispute in this case that the threshold criteria pursuant to s 31(2) of the Children Act 1989 are made out by reason of the matters set out the application form. In the circumstances, this court has jurisdiction to consider making orders under Part IV of the Children Act 1989.
41. I turn first to N’s welfare needs as identified within the framework of the welfare checklist set out in s 1 of the Children Act 1989. As I have noted above, whilst N did at times at the outset of the placement express the wish to return to the care of his mother, and sometimes expresses a wish to return home to collect electronic items, he now speaks in a manner that suggests he contemplates his future at LCR. With respect to his physical, emotional and educational needs, by common acclaim these are accepted to be highly complex in nature. The court has before it clear expert evidence of N’s particularly complex emotional needs, and clear evidence of the additional factors that complicate the same, including his ADHD and epilepsy. In circumstances where N has been placed at LCR for a number of months, and in particular in circumstances where he is making progress (and has ‘turned a corner’ to use Dr Kennedy’s formulation), the evidence before the court clearly demonstrates that the effect on N of changing his current circumstances would be a significantly adverse one.
42. N is a slight, vulnerable 11 year old child who has a reactive attachment disorder, oppositional defiant disorder, ADHD and epilepsy. These characteristics make managing his behaviour extremely challenging and will continue to do so, meaning that N will continue to find it difficult to regulate his emotions, trust others and sustain relationships. Within this context, N is at risk of significant harm if his complex needs are not met by compensatory parenting in an environment that is safe, stable and secure. In addition, N is a boy who is apt to say offensive and racially

charged things that are likely to bring him to the attention of others. Within this context, given the location of the family home, I am satisfied that his behaviour coupled with his vulnerability would expose him to a significant risk of exploitation by criminal gangs or other undesirable elements within his community.

43. What is plain from the foregoing analysis is that the evidence before the court demonstrates beyond peradventure that N's welfare needs are enormously complex and require stable, specialist and consistent therapeutic care to meet those diverse and multifaceted needs. In short, the task of parenting N is now a *highly* specialised one, with which even the most competent and experienced parent would struggle to complete successfully.
44. In this context, the options for meeting N's highly complex welfare needs that are now advanced before the court comprise a return to the care of the mother or the continuation of his current therapeutic placement at LCR. Whilst it might be observed that there must, in light of the matters I have set out above, be a legitimate question mark over whether the return of N to the care of the mother can be considered a *realistic* option, the Court of Appeal has made clear that once the court is immersed in the detail of the case at final hearing, the court must conduct an ordinary full welfare evaluation of the options before the court (see *Re W-C (Children)* [2017] EWCA Civ 250). Within this context, I deal first with the advantages and disadvantages of placement with his mother.
45. As I have observed, the mother plainly loves N. However, beyond this important observation, the mother is also an intrinsic element of N's life and of his identity. As N grows up, and as the Children's Guardian made clear in her evidence, his relationship with his mother will continue to be very important to him. Within this context, a placement with his mother would allow those advantages to pertain most directly for N. Against this however, there are, I regret, manifest disadvantages to N returning to the care of his mother. The evidence before the court is clear that the mother would not be able to meet N's complex needs on a day to day basis. As was pointed out by Dr Kennedy, this is demonstrated most starkly by the fact that contact between N and his mother has been reduced from 2 hours to 1 hour each session at the mother's instigation. Whilst Mr Squire is right to give credit to the mother for suggesting this reduction in N's best interests, it demonstrates the gulf between the mother's desire to care for N and her ability to do so.
46. Further, and within this context, whilst I am satisfied that the mother would never deliberately expose N to harm, the consequences of her inability to meet N's complex needs presents grave risks for N, and indeed to the mother. The unchallenged evidence before the court demonstrates that the mother was increasingly unable to keep N safe even with support and that her own wellbeing suffered from her inability to control him. Having regard to the expert evidence before the court, there is no evidence that the mother has sufficiently ameliorated these difficulties. In addition, and as I have noted, whilst it is the case that there is no evidence before the court that N (or his sibling) have had contact with or involvement with gangs or other organised criminal groups, it would in my judgment be foolhardy to ignore this risk. N is a vulnerable 11 year old boy who is apt to say offensive and racially charged things that are likely to bring him to the attention of others in the community in which his family home is located. Satisfied as I am that his behaviour coupled with his vulnerability would expose him to a significant risk of exploitation by criminal gangs or other

undesirable elements within his community, I am equally satisfied that, sadly, his mother is not equipped at present to effectively protect him from this risk.

47. Within this context, and very sadly, when looking at the question of the mother's ability to meet N's highly complex needs the court must conclude that she is not in at present in a position to do so.
48. I turn next to the advantages and disadvantages of the continuation of N's current placement at LCR under a final care order. Given the importance for N of his relationship with his mother, the obvious disadvantage of N remaining at LCR is that it will make it more difficult for him to maintain and develop his important relationship with his mother. However, against this, there are manifest advantages in maintaining his current therapeutic placement.
49. Once again, the starting point for the evaluation of this option must be the recognition that N's needs are highly complex and capable of being met only with specialist resources in a range of disciplines. LCR, and in particular Ms Clark, is admirably equipped to meet those complex needs. The undoubted and unchallenged progress made by N in this placement speaks to this. Looking forward, Dr Kennedy is clear that the next and vital step in addressing N's complex needs is the commencement of therapeutic input as an element of the compensatory parenting that N is now receiving. This too can be provided at LCR. The local authority is clear that N can remain at this therapeutic placement for as long as is necessary. Within the foregoing context, and in particular having regard to the evidence of Ms Clark and Ms Richards, I am satisfied that by far the most efficacious option for meeting N's current, complex welfare needs is the specialist therapeutic residential placement at LCR.
50. Having undertaken a comparative analysis of the options before the court, I am satisfied that the option that best meets the duty to afford paramount consideration to N's welfare, having regard to the principle of proportionality under Art 8(2) of the ECHR, is the option that results in N remaining in his current therapeutic placement at LCR. I am satisfied that that outcome is plainly in N's best interests, having regard to those best interests as my paramount concern.
51. I am also satisfied that it is appropriate in this case to grant a declaration authorising as lawful the deprivation of N's liberty at LCR. No party sought to argue that the regime presently adopted by LCR in respect of N does not constitute a deprivation of his liberty for the purposes of Art 5 of the ECHR. N is not able to consent to being confined and will be the subject of a care order secured by the State. Having regard to the features of that regime I am satisfied that, bearing in mind Cobb J's view that the terms 'complete' or 'constant' define 'supervision' and 'control' as indicating something like 'total', 'unremitting', 'thorough', and/or 'unqualified' (see *Re RD (Deprivation or Restriction of Liberty)* at [31]), the regime of supervision to which N is subject can be characterised as 'unremitting' and plainly falls within the concept of continuous supervision or control or, to put it in the terms of the *Storck* criteria, amounts to confinement to a certain limited place for a not negligible period of time. I am satisfied that comparing the situation in which N finds himself with the ordinary life of a 11 year old young person living at home with his family there are significant features that would not apply to a child of the same age, station, familial background and relative maturity who is free from disability. Within this context, the living and

care arrangements that are in place for N at LCR amount to a ‘confinement’ so as to give rise to a deprivation of her liberty for the purposes of Art 5 of the ECHR.

52. Finally, it is important for the court to make some observations regarding the incident of restraint that took place on 8 March 2019. With respect to that incident of restraint, as I made clear at the outset and I make clear again, I make no findings on the balance of probabilities in respect of the incident in circumstances where there may be further civil proceedings in respect of the same. However, given the nature of the incident, as described above on the basis of the unchallenged evidence before the court, it is appropriate for the court to make the following observations.
53. First, the situation that arose on 8 March 2019 must give cause for concern given the nature and extent of the restraint used, in particular the fact that there came a point when N, a slight and highly disturbed 11 year old child, was handcuffed and placed in leg-restraints by the police for an extended period, including during his transport to hospital. Second, whilst making no findings, even a cursory reading of the records pertaining to the incident on 8 March 2019 suggests an unedifying picture of bickering over responsibility for managing N’s deteriorating behaviour on that date and as to the correct course of action. This cannot have assisted when seeking to achieve a prompt and calm resolution of the situation for N. Third, and finally, whilst the situation was clearly challenging for all involved, it is plain that it had an understandably adverse emotional impact on N, particularly in circumstances where he had an acute aversion to his legs being touched. Having made those brief observations, and in circumstances where there may be further civil proceedings in respect of the events of 8 March 2019, I say no more.
54. Having regard to the evidence and discussion set out above, I am satisfied that it is in N’s best interests to make a final care order on the basis of the amended final care plan, which plan I approve, subject to making the following comments with respect to contact. In the amended care plan the local authority proposes a baseline of monthly contact between the mother and N. Whilst the mother does not seek to constrain the local authority’s management of contact in circumstances where contact will need to be led by N’s needs, she does point to the evidence of the Children’s Guardian that, whilst making clear that his needs may require a reduction in contact in the future (for example, as a result of the demands of therapeutic intervention), she could identify no welfare reason why the current level of contact of 1 hour every fortnight should not continue at present. I likewise do not intend to constrain the local authority with respect to the management of contact by making an order under s 34 of the 1989 Act. However, I am satisfied that if N wishes to have contact with his mother every fortnight for an hour I likewise cannot identify any welfare basis for objecting to this.
55. Finally, for the reasons I have set out above, I am also satisfied that it is appropriate in this case to declare as lawful the deprivation of N’s liberty constituted by his placement at LCR and I so declare.

CONCLUSION

56. One of the saddest tasks this court is faced with is having to conclude that a child cannot return to the care of a parent not because of the abuse of the child by that parent, or the malicious or feckless failure by that parent to meet the child’s physical, emotional and educational needs, but rather because, through no fault of their own,

the parent labours under a disability that renders them simply unable to meet the needs of a child whom they dearly love. As Mr Squire points out, the tragedy of such a situation is often given an even harder edge by the fact that the parent in question is unable to perceive that they are not to blame for the situation in which they find themselves. Such is the case here. The mother loves N. She gave her evidence with dignity and sincerity. The sad conclusion of the court however, is that the mother is not at present, by reason of her inherent deficits and thus through no fault of her own, capable of meeting the complex welfare needs of her son.

57. One other matter falls for comment. As I have noted during the course of this judgment, N has made significant progress in his current placement. I am entirely satisfied that this is due largely to the dedicated, high calibre work of Ms Clark and Ms Richards, together with others who have supported them. Notwithstanding the challenges presented by N, Ms Clark and Ms Richards have steadfastly refused to take his challenging behaviour as anything other than N seeking to try to communicate to them what he needs. They have stuck by him when there were reasons to contemplate the ending of his placement and have worked extremely hard to help him make progress by engendering his trust through ensuring consistency, certainty and a sense for the N that the adults who are working with him will not be going anywhere.
58. It is important to note, and to acknowledge, that Ms Richards, Ms Clark and the staff at LCR have taken this professional, humane and understanding approach towards N, by which they refused to be deflected by challenging and sometimes violent behaviour on the part of an extremely vulnerable child, notwithstanding that during the initial stages of the placement N was regularly verbally and aggressively abusive to them and that, as made clear in a report prepared by Ms Clark on 10 April 2019:
- “N has used many objects as weapons towards staff. N has repeatedly made verbal threats to stab and kill staff and has shown intent through his actions by attempting to access and use knives towards staff, as well as adapting objects and materials from the home environment into sharp objects which he has tried to use as weapons against staff, for example, using a piece of the blind in his room, wooden chair legs (which he has broken), and metal runners from drawers.”
59. Beyond reflecting the dedicated and professional approach of Ms Clark and Ms Richards, which confers great credit on each of them, the progress achieved with N in this case is also to my mind a timely and important reminder of why *continuity of placement* and *continuity of professionals* is so very, very valuable to vulnerable children in the care system, and why such continuity of care and continuity of professionals should be the *rule* and not the exception for those children. Within this context, not only do I endorse in this case an outcome that ensures that N will continue to benefit from Ms Clark’s oversight at LCR but I also welcome in particular the indication of the local authority that Ms Richards will be remaining as N’s allocated social worker notwithstanding the making of a final care order. As N rightly says, Ms Richards “is *my* social worker”.
60. That is my judgment.