Neutral Citation Number: [2019] EWHC 1510 (Fam)

Case No: MA18C00783 AND MA18P01919

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Lancaster Castle
2 Castle Park
Lancaster, LA1 1YQ

Date: 17/06/2019

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

Salford City Council	**Applicant**
- and -	
NV	**First Respondent**
- and -	
AM	**Second Respondent**
- and -	
M (By her Children's Guardian)	**Third Respondent**

Ms Frances Heaton QC and Mr Shaun Spencer (instructed by the **Local Authority Solicitor**) for the **Applicant**
Mr John Tughan QC and Mr Simon Miller (instructed by **KHF Solicitors Ltd**) for the **First Respondent**
Mr Nicholas Goodwin QC and Danish Ameen (instructed by **WTB Solicitors**) for the **Second Respondent**
Ms Frances Judd QC and Martine Swinscoe (instructed by **Bromleys Solicitors LLP**) for the **Third Respondent**

Hearing date: 21 May 2019

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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.

.....

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in it) to be published on condition always that the names and the addresses of the parties and the children must not be published.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. This court is concerned with the welfare of M, born in 2005 and now aged 13 years old. At this hearing I am ostensibly concerned with an application to adjourn these proceedings. However, given the nature and complexity of the issues that arise for consideration when determining whether to grant the local authority's application to adjourn, in order to permit it to issue a petition in the Inner House of the Court of Session in Scotland for reasons that will become apparent, and whether to grant the further interim relief under the inherent jurisdiction of the High Court sought by the local authority pending the determination of that petition, I heard full submissions before announcing my decision at the conclusion of the hearing with reasons to follow. I now set out those reasons.

2. I also considered it important to deliver a reasoned judgment in this matter in light of the view expressed by the expert on Scottish law jointly instructed in these proceedings, Mr Alan Inglis, a barrister admitted to both the English and Welsh and the Scottish Bar, that the *ratio* of the decision of the Court of Session in *Cumbria Country Council and Ors, Re Children X, J, L and Y* [2016] CSIH 92 (also referred to as *Cumbria Country Council, Petitioner*) is apt to be misunderstood in this jurisdiction and that:

> "I am aware from my practice of many orders having been made or considered in the High Court of the type under consideration, without the apparent knowledge of the Scottish Government. Typically, the orders are sought without prior enquiry as to their lawfulness in the country to which they are intended to take effect. Placements have been disrupted once advice has been received. There is a risk that placements are continuing where no advice has been sought. It would be helpful if authoritative guidance was given by the Court, particularly in light of the questionable footnote in the Family Court Practice upon which reliance is likely to have been put."

3. M is currently accommodated in a placement in Scotland in circumstances which amount to a deprivation of her liberty for the purposes of Art 5 of the European Convention on Human Rights (ECHR), which current placement is *not* a placement approved by the Scottish Ministers for the provision of secure accommodation of children for the purposes of the relevant Scottish legislation, namely the Children's Hearings (Scotland) Act 2011 and the Secure Accommodation (Scotland) Regulations 2013.

4. The footnote in the Family Court Practice to which the jointly instructed expert refers in the extract of his report set out above appears at page 530 of the 2018 version of that publication and reads as follows:

> "Placement out of England- See also Procedural Guide D17. Where such a placement is authorised to place a child in Scotland, the local authority must apply to the Court of Session in Scotland for a mirror order under the *nobile officium*: *Cumbria Country Council, Petitioner* [2016] CSIH 92."

The notes to Procedural Guide D17 at page 174 in the 2018 version of the Family Court Practice, to which the footnote at page 530 of that publication refers, contain a further reference pertinent in this case and parts of which reference likewise fall to be questioned given the expert evidence that this court has received. That reference states as follows:

> "A child in England and Wales may be placed in secure accommodation in Scotland if the residential unit has been approved by the Scottish Ministers and a child in Scotland may be placed in secure accommodation in England and Wales if the residential unit has been approved by the Secretary of State: Children and Social Care Act 2017, s 10 and Sch 1. If a unit is not approved by either the Secretary of State of the Scottish Ministers, a child may still be placed in secure accommodation pursuant to the inherent jurisdiction of the High Court: *Re X and Y (Secure Accommodation: Inherent Jurisdiction)* [2017] 2 FLR 1717, FD and *Cumbria County Council, Petitioner* [2016] CSIH 92"

5. Within this context, on 4 October 2018 His Honour Judge Butler sitting as a judge of the High Court made an order under the inherent jurisdiction of the High Court of England and Wales authorising the deprivation of M's liberty in her current Scottish placement. It is this latter order made by the English court to which the jointly instructed expert makes reference in the extract from his report set out above. At the hearing on 4 October 2018, HHJ Butler also recorded the local authority's intention to apply to the Court of Session in Scotland for an order in Scotland under the *nobile officium*. However, on 8 November 2018 the local authority received legal advice from its Scottish solicitors to the effect that there is no method by which a child's liberty can be lawfully deprived in the jurisdiction of Scotland in a placement that is *not* approved by the Scottish Ministers for the provision of secure accommodation for children, including by way of an order of the English High Court authorising a deprivation of liberty. Highly regrettably, that advice was not brought to the attention of the English court until 23 April 2019, some *five* months later. On that date, in light of that development and with my agreement, HHJ Butler re-allocated the matter to me to determine the question of whether the interim deprivation of liberty authorisation in respect of M's placement in Scotland granted on 4 October 2018 should be further continued in light of the advice received from the Scottish solicitors.

6. In light of the way matters have developed during the course of this hearing, the issues that require to be determined at this stage of these proceedings are as follows:

   i) Is M currently deprived of her liberty in her placement in Scotland?

   ii) If so, should this court permit an adjournment of these proceedings to enable the local authority to petition the Inner House of the Court of Session in Scotland for orders under the *nobile officium* "to find and declare that the measures ordered by the High Court in respect of [M] should be recognised and enforceable in Scotland as if they had been made by the Court of Session" (see *Cumbria Country Council and Ors, Re Children X, J, L and Y* at [35])?

   iii) If so, should this court further extend the current interim deprivation of liberty authorisation in respect of M's current placement in Scotland pending a decision by Inner House of the Court of Session?

7. As I have stated, the court is assisted in this case by an expert opinion on Scottish law. In addition to the questions regarding the approach under Scottish law to the placement of English children in Scotland in placements that are *not* approved by the Scottish Ministers for the provision of secure accommodation raised by the expert opinion, that opinion is also relevant to the merits of the application to adjourn these proceedings in that it informs the question of the chances of the local authority securing relief in Scotland under the *nobile officium*. Were this court to conclude that the legal position in Scotland is so clear on its face that any application by the local authority to the Inner House of the Court of Session would be bound to fail then there would be little merit in an adjournment and exploration of alternative provision for M in England should commence now. If the court concludes however, that an adjournment is merited on this basis, the expert report also informs the merits of granting further interim relief in this jurisdiction in the form of a declaration concerning M's deprivation of liberty pending the outcome of proceedings in Scotland.

8. These proceedings are brought by Salford City Council, represented by Ms Frances Heaton, Queen's Counsel and Mr Shaun Spencer of Counsel. The proceedings are responded to by M's mother, NV, represented by Mr John Tughan, Queen's Counsel and Mr Simon Miller of Counsel, by M's father, AM, represented by Mr Nicholas Goodwin, Queen's Counsel and Mr Danish Ameen of Counsel and by M, represented through her Children's Guardian, Emma Cauden, by Ms Frances Judd, Queen's Counsel and Ms Martine Swinscoe of Counsel.

BACKGROUND

9. The wider background to this matter can be taken relatively shortly in circumstances where the issues before this court concern M's current position. M has three half siblings, L, in respect of whom care proceedings concluded on 23 April 2019 with a care plan providing for him to live with his mother and her partner, N and H (known as T). T is the subject of a care order in favour of Salford City Council and was made the subject of a secure accommodation order on 4 February 2019.

10. The mother and the children moved from Eastern Europe to England in or around 2012 or 2013. The mother and children initially resided in South East England, where they became known to children's services as the result of domestic abuse in the mother's relationship. Salford City Council became involved with the family in 2013. Between 2015 and 2017 the children were identified as children in need, made the subject of Child Protection Plans and, in respect of T, accommodated pursuant to s 20 of the Children Act 1989. Due to apparent progress, the case again became one of Children in Need in May 2017.

11. Thereafter, in respect of both T and M, there was an increase in episodes of them being missing from home. M presented with significant challenging behaviours whilst at home, which behaviours included aggression towards her mother, damage to property and sexualised behaviour. The mother was considered to be inconsistent in her response to these behaviours and the local authority contend that the home was chaotic and dysfunctional. The children were again made the subject of Child Protection Plans on 9 November 2017.

12. M continued regularly to go missing from home and was considered to be a victim of child sexual exploitation. She attended school only sporadically and when she did so her engagement was problematic. A CAMHS assessment report dated 4 June 2018 opined that M remained very vulnerable to exploitation. The report also related incidents of self-harm. In July 2018 the mother indicated that she felt unable to parent M, who was accommodated under s 20 of the Children Act 1989 and placed in a residential children's home locally. Care proceedings were issued and M was made the subject of, and remains subject to an interim care order.

13. Whilst at the local residential placement M continued to abscond, leading to her being exploited by older men, which exploitation included the consumption of drugs and alcohol and engagement in sexual activity. M was noted to involve or encourage other children in these activities.

14. In September 2018, and in the context of the Children's Guardian expressing grave concerns that a residential placement proximate to M's home area was failing to meet M's needs, an alternative non-secure placement was identified in the West Country. At this time the local authority was satisfied that the grounds for making a secure accommodation order were made out but did not wish to pursue such an application, believing the option of a non-secure residential placement would better meet M's needs. The Children's Guardian believed that secure accommodation was necessary for M but, having spoken with staff at the proposed non-secure unit, did not oppose the local authority's plan. In the event however, it became apparent that the placement in the West Country was not one that could proceed and it did not do so.

15. Further efforts located a placement called '[the placement]' in Scotland operated by an English company headquartered in Leeds. In circumstances where no suitable placements were identified in England, M was placed at '[the placement]' on 8 September 2018. The court was notified of this change of placement on 10 September 2018 and the matter returned to court upon the application of the Children's Guardian on 17 September 2018. The order made on that date records that the parties were agreed that it was in M's best interests to remain in her placement in Scotland. Having regard to the regime under which M was cared for at '[the placement]' the court directed the local authority to issue an application for permission to invoke the inherent jurisdiction of the High Court and for an order authorising the deprivation of M's liberty.

16. As I have already noted, at a hearing on 4 October 2018 His Honour Judge Butler sitting as a judge of the High Court gave the local authority permission to invoke the inherent jurisdiction and, having concluded that M was being deprived of her liberty for the purposes of Art 5 of the ECHR, made an interim declaration authorising the deprivation of M's liberty at her placement in Scotland. The current regime to which M is subject at '[the placement]' can be summarised as follows:

    i) M is the subject of constant 2:1 staff supervision whilst in the placement.

    ii) Staff are always aware of her whereabouts and will intervene by means of persuasion if she attempts to leave the placement. M is not *physically* restrained from leaving the placement but is encouraged to return if she leaves (and has always done so to date);

iii) When in her room staff will remain present in the corridor outside. M is able to lock and unlock her own bedroom but staff are able to and will unlock the room if they are concerned about her welfare. If she is locked in her room M will be observed every 15 minutes by staff unlocking the door;

iv) M is monitored by staff during the night by way of a wake and watch provision during the course of the night system. The doors to the placement are locked at night (albeit there is no suggestion that this is to ensure M does not leave as opposed to ensuring the general safety and security of the placement).

v) All challenging behaviour is managed and certain behaviour is physically restrained. Restraint is used in the placement to protect M or others if her behaviour escalates to the extent that she is at risk of harming herself or others;

vi) M's access to the Internet is supervised in the placement and whilst at school;

vii) M is transported to and from school by two members of staff from the placement with those staff members remaining at school if M's behaviour requires it.

viii) When M attends a school activity or other outside activity she is accompanied by two members of staff;

ix) M is permitted 30 minutes each day in which she is able to be in the grounds of the placement and is permitted to be by herself in the local town for 30 minutes each week with supervising staff remaining 'in the vicinity'.

17. As I have noted above, the local authority failed to bring to the attention of the court until 23 April 2019 legal advice it had received on 8 November 2018 from Scottish solicitors to the effect that there is no method by which a child's liberty can be lawfully deprived in the jurisdiction of Scotland in a placement that is not approved by the Scottish Ministers. At a hearing on 23 April 2019, HHJ Butler rightly deprecated the actions of the local authority in the strongest terms, continued the interim authorisation and re-allocated the proceedings to me to determine the question of whether the interim deprivation of liberty authorisation in respect of M's placement in Scotland should be further continued in light of the advice received from the Scottish solicitors. At a directions hearing on 1 May 2019 I gave the parties permission to obtain a jointly instructed expert opinion on Scottish law from Mr Inglis.

18. M remains placed at the '[the placement]' were she is making some progress. As at the date of this hearing she has not tried recently to abscond and has been engaging well with her schooling. Against this, M has tried to slash her own throat with a broken vase and has tried to strangle herself with a seatbelt. An expert psychological report authored by Jean Sambrooks opines that M has limited understanding of regulating her emotions and limited understanding and acceptance of societal norms. Ms Sambrooks considers that M is likely to continue to engage in risk taking behaviour should she return to her home area or any other area of high density population. Within this context, Ms Sambrooks considers that '[the placement]' is the most appropriate long term placement for M. Within this context, the local

authority's final care plan for M provides for her placement at '[the placement]' under the auspices of a final care order, with contingency planning involving the identification of alternative placements in England should the placement at '[the placement]' not be capable of being sustained. The mother, the father and the Children's Guardian support this care plan.

19. Within the foregoing context, there is a particular and significant tension created in this case between the potential legal difficulties pertaining to M's current placement in Scotland and the fact that, in relative terms, M is making some progress in that placement, which placement appears suited to meeting her needs and is considered to be the correct placement for her in the longer term. In the circumstances, all parties are anxious that principled differences of approach that mark the border between the sovereign English and Scottish legal systems should not, if possible, prejudice the continuation on the ground of a placement that is demonstrably benefiting a vulnerable child if a way of reconciling those differences can be found.

THE EXPERT EVIDENCE

20. As I have noted, the expert opinion on Scottish law in this case is provided in a comprehensive and lucid report from Mr Alan Inglis dated 13 May 2019. In addition, Mr Inglis has provided an addendum report dated 20 May 2019 answering further questions put to him by the parties in writing.

21. Mr Inglis begins by noting that M is currently accommodated in a placement in Scotland, which placement is not approved by the Scottish Government for the provision of secure accommodation of children. In providing his opinion, Mr Inglis indicates that he makes the following assumptions (all of which, on the evidence before this court, are justified):

    i) M is habitually resident in the jurisdiction of England and Wales;

    ii) M is a 'looked after child' in circumstances where she is the subject of an interim care order in favour of the local authority;

    iii) M's placement at '[the placement]' is not intended to be permanent;

    iv) There is no intention to transfer responsibility for M to the Scottish area authority;

    v) Having considered the welfare of M, the English court has determined that, whilst a secure accommodation order is not appropriate, it is necessary and proportionate to provide her with accommodation that amounts to a deprivation of her liberty;

    vi) '[the placement]' is not secure accommodation as defined by the relevant Scottish legislation.

22. Within this context, and in summary, Mr Inglis opines as follows in his substantive and addendum reports with respect to the legal position in Scotland regarding M's current placement at '[the placement]' within the context of the orders that have been made by the English Court:

i) Section 25 of the Children Act 1989 as amended by the Children and Social Work Act 2017 s 10(a) and Schedule 1 is not engaged in this case. The effect of the amendment is that a child who satisfies the conditions of s 25 of the Children Act 1989 may be made the subject of an English secure accommodation order which places the child in an institution in Scotland that is approved by Scottish Ministers to provide secure accommodation. '[the placement]' is not so approved;

ii) A Scottish secure accommodation order made by a Children's Hearing under s 83(5)(a) of the Children's Hearing (Scotland) Act 2011 could not provide lawful status to M's placement at '[the placement]' because, once again, regulation 3 of the Secure Accommodation (Scotland) Regulations 2013 stipulates that no secure accommodation may be provided unless it has been approved by the Scottish Ministers;

iii) The Scots law which authorises the holding of children in conditions which deprive them of their liberty is set out in s 83(5) and (6) of the Children's Hearings (Scotland) Act 2011 and the Secure Accommodation (Scotland) Regulations 2013. There is no other relevant statutory provision in Scots civil law. Within this context, there is nothing in the *ratio* of *Cumbria Country Council and Ors, Re Children X, J, L and Y* that permits the deprivation of a child's liberty in Scotland outwith these Scottish statutory provisions. The ratio of *Cumbria Country Council and Ors, Re Children X, J, L and Y* is not that *any* orders made under the inherent jurisdiction of the English High Court will be recognised under the *nobile officium* jurisdiction. Rather, the ratio of the case is that where there is demonstrated a *prima facie* case that the *nobile officium* might apply to a particular type of order made under the inherent jurisdiction of the English court, and the balance of convenience favours an interim order pending full argument, the court is able to grant interim order under the *nobile officium* (Mr Inglis further pointing out that in *Cumbria Country Council and Ors, Re Children X, J, L and Y* interim orders were not opposed and, accordingly, full legal argument was not heard on the point).

iv) Within this context, it is unlikely that relief in the form of recognition of an order made under the inherent jurisdiction of the English High Court authorising a deprivation of liberty in a Scottish placement not approved by the Scottish Ministers for secure accommodation would be granted by the Scottish court under the *nobile officium* jurisdiction of the Inner House of the Court of Session. The power of the court in this regard is confined to *casus improvisus* in its true sense, i.e. cases that have not been foreseen and therefore have not been provided for. The jurisdiction does not extend to cases where the statutory omission is deliberate as this would trespass on the province of the legislature. The *nobile officium* cannot be exercised in such a way as to conflict with or defeat a statutory intention.

v) Within this context, where the 2017 Act provides for cross border recognition of orders made under s 25 of the Children Act 1989 but analogous orders under the inherent jurisdiction are not included, it would be a bold argument to suggest that the latter was unforeseen. Further, the omission from the Scottish legislation of provision for secure accommodation in placements *not* approved by the Scottish Ministers was not unforeseen but intentional and, further,

authorisation of deprivation in an unapproved institution would conflict with specific legislative provision. Within this context, and where provisions relating to the liberty of the subject are always strictly construed, no *casus improvisus* arises and the *nobile officium* is unlikely to be available.

vi) The reasoning in *Cumbria Country Council and Ors, Re Children X, J, L and Y* narrows any distinction in Scots law between the *parens patriae* jurisdiction and the *nobile officium* jurisdiction by holding that the former has been subsumed in the latter. Whilst it could be argued that this conclusion does not sit well with the obiter discussion of the *parens patriae* jurisdiction in *Law Hospital NHS Trust v Lord Advocate* 1996 SC 301, which appears suggestive of a separate jurisdiction, if *Cumbria Country Council and Ors, Re Children X, J, L and Y* is a correct statement of the law there appears to be no longer a separate cause of action under the *parens patriae* jurisdiction. In any event, there is nothing in *Law Hospital NHS Trust v Lord Advocate* which suggests that an inherent power can be deployed to supplement the clear and intentional limitations of a statute;

vii) Within the foregoing context, the Scottish court would not have the power to make a 'mirror' order (or any other order) depriving a child of her liberty as contemplated in the 2018 version of the Family Court Practice at pages 530 and 174 where the child is deprived of his or her liberty not in a secure placement in Scotland under a secure accommodation order pursuant to s 25 of the Children Act 1989 but in a non-secure placement in Scotland pursuant to an order made under the inherent jurisdiction of the English High Court;

viii) It is unlikely that the Principal Reporter would conclude pursuant to s 66(2) of the Children's Hearings (Scotland) Act 2011 that it is necessary for a compulsory supervision order to be made in respect of M where she is already protected by an English interim care order;

ix) Schedule 3 paragraph 10 of the Adults with Incapacity Act (Scotland) 2000 provides a *possible* alternative course for the recognition of orders made in England and Wales regarding M's welfare, although the Scottish Minister may contend that, whilst widely drawn, that provision is subject to the definition of "adults" in s 1(6) of the 2000 Act.

x) Art 5 of the ECHR applies throughout the United Kingdom. In the absence of lawful authority breaches arising out of M's placement in Scotland would be actionable in Scotland and any individual responsible would be subject to Scots law, including possible criminal sanction.

23. Accordingly, whilst acknowledging that the issue of the relationship in Scotland between the *parens patriae* jurisdiction and the *nobile officium* jurisdiction is an area of controversy in which further litigation is likely, in circumstances where the principle that the inherent powers comprised of the *nobile officium* will not be employed to supplement a statute is well settled and the relevant Scottish statute does not permit M's secure accommodation within her current placement, Mr Inglis opines that a petition to the Inner House of the Court of Session is unlikely to succeed and should not be laid.

SUBMISSIONS

24. The local authority submits that, on balance, M is a child who is deprived of her liberty in her placement in Scotland for the purposes of Art 5 of the ECHR. The local authority points in this regard to the limitations on M's ability to be on her own at school, on other visits and in the community, the level of two to one supervision that is present both inside and outside the placement, the restrictions on her use of the Internet and the use of physical restraint as a means of protection for M and for others in the event that her behaviour escalates. The local authority further points to the previous view of this court that M is being deprived of her liberty. Within this context, the local authority contends that M is deprived of her liberty in her current placement and that the interim order authorising that deprivation of liberty under the inherent jurisdiction should continue pending the determination of the petition is seeks to pursue in the Court of Session.

25. The local authority, in common with the other parties to this case and whilst acknowledging his expertise, submits that having regard to the judgment in *Cumbria Country Council and Ors, Re Children X, J, L and Y* Mr Inglis' conclusions are too pessimistic and that these proceedings should be adjourned in order to permit it to petition the Inner House of the Court of Session with a view to inviting it to invoke the *nobile officium*. Ms Heaton and Mr Spencer submit that, for reasons I deal with below, it would not appear that the Inner House of the Court of Session has considered the application of the *nobile officium* in the context of a child placed in Scotland in a placement not authorised as 'secure accommodation' and deprived of his or her liberty under the authority of an order made under the inherent jurisdiction of the English High Court. Further, the local authority submits that on a proper reading of *Cumbria Country Council and Ors, Re Children X, J, L and Y*, whilst the observations of the Court of Session regarding the imperatives of *casus improvisus* jurisdiction would tend to indicate difficulties with respect to invoking the *nobile officium*, that court's observations regarding the *parens patriae* jurisdiction give more cause for optimism in this regard, particular in circumstances where removing M from her current placement after nine months and in circumstances where she has made progress would be a damaging setback for her and plainly not in her best interests.

26. Within this context, pending a decision from the Court of Session on its intended petition and in circumstances where it is established that the *English* Court has the power to authorise M's deprivation of liberty in a placement in Scotland, the local authority submits that the balance of convenience favours the continuation of the interim order authorising the deprivation of M's liberty at '[the placement]' at this point in time.

The Mother

27. On behalf of the mother, and within the context of her continued support for M's placement at '[the placement]', Mr Tughan and Mr Miller submit that, on balance, M is not deprived of her liberty for the purposes of Art 5 of the ECHR. In their comprehensive Skeleton Argument Mr Tughan and Mr Miller base this contention largely on a comparison with the circumstances of this case with the circumstances that pertained in respect of the young person in *Re RD (Deprivation or Restriction of Liberty* [2018] EWFC 47 and *Re AB (A Child)(Deprivation of Liberty: Consent)* [2015] EWHC 3125 (Fam). In their oral submissions however, Mr Tughan and Mr

Miller conceded that comparisons with the factual framework in decided cases may not be helpful and accepted that the court must apply the legal principles to the facts of the instant case. I would go further and state that, in the context of the comparator the authorities require the court to use (namely, the ordinary lives which young people of the subject child's age might live at home with their families), comparisons with the factual framework in other decided cases is not only unhelpful but is unprincipled in this context. If, contrary to their submission, the court finds that M *is* deprived of her liberty, Mr Tughan and Mr Miller, in common with the local authority, submit that Mr Inglis' analysis of the availability of the *nobile officium* in this context is overly pessimistic and that certain passages in *Cumbria Country Council and Ors, Re Children X, J, L and Y* tend to suggest that a petition to invoke the *nobile officium* in this case would be likely to succeed, in particular the contents of the judgment of the Court of Session from paragraph [20] onwards, which paragraphs I deal with further below when summarising the relevant law.

The Father

28. On behalf of the father, Mr Goodwin and Mr Ameen submit that M is deprived of her liberty for the purposes of Art 5 of the ECHR in her current placement. Further, Mr Goodwin and Mr Ameen point out that all parties are agreed that '[the placement]' is meeting M's needs. Within this context, whilst acknowledging that the statutory provisions presently in place do not assist in this case, Mr Goodwin and Mr Ameen point out that whilst Council Regulation (EC) 2201/2003 (BIIa) and the Family Law Act 1986 do not apply, at the heart of both the European and domestic legislation is a recognition and appreciation that children's best interests are served by comity and co-operation between different jurisdictions. In these circumstances, Mr Goodwin and Mr Ameen submit that where the need for stability and consistent care is at the root of a child's needs (as it is in M's case) the disruption of that care "on the basis of a legal technicality" would be unfortunate.

29. In line with the other parties, Mr Goodwin and Mr Ameen submit that the expert opinion of Mr Inglis as to the chances of the Inner House of the Court of Session granting relief under the *nobile officium* is unduly pessimistic, that the local authority will be able to mount an arguable case in Scotland for the deployment of the *nobile officium* in this case and that this court cannot be confident that the Inner House of the Court of Session in Scotland will inevitably decline to apply the *nobile officium* having regard to the fact that '[the placement]' is meeting M's needs. Accordingly, Mr Goodwin and Mr Ameen submit that it is incumbent upon the court to permit an adjournment to allow the local authority the time to mount its petition in Scotland. Further, Mr Goodwin and Mr Ameen submit that in these circumstances, and where the jurisdiction of the *English* court to authorise the deprivation of M's liberty in her placement in Scotland is established, the balance of convenience favours the court continuing the interim relief that has been granted by HHJ Butler pending the decision of the Inner House of the Court of Session.

M

30. The Children's Guardian is clear in her view that it is in M's best interests to remain in her current placement. On behalf of M, Ms Judd and Ms Swinscoe do not seek to provide a definitive submission on whether M is deprived of her liberty. However, should the court conclude that is the case, on behalf of M, Ms Judd and Ms Swinscoe

join with the other parties in urging the court to adjourn this matter to permit the local authority to petition the Inner House of the Court of Session for relief under the *nobile officium*.

RELEVANT LAW

31. For the purposes of considering the three issues before the court, the following legal principles are relevant and have been the subject of comprehensive written submissions by the parties, supplemented by further oral submissions at the hearing.

Deprivation of Liberty

32. It is a fundamental principle of a democratic society that the State must adhere to the rule of law when interfering with a person's right to liberty and security of person (see *Brogan v United Kingdom* (1988) 11 EHRR 117 at [58]).

33. Art 5(1) of the ECHR provides as follows in respect of a person's right to liberty and security of person:

> "**ARTICLE 5**
>
> **Right to liberty and security**
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

34. It is well established that the rights enshrined in the ECHR are to be read and given effect in domestic law having regard to the provisions of the UN Convention on the Rights of the Child (see *Al Adsani v United Kingdom* (2001) 12 BHRC 88 at 103, *Dyer (Procurator Fiscal, Linlithgow) v Watson; JK v HM Advocate* [2004] 1 AC 379

and *Smith v Secretary of State for Work and Pensions* [2006] 1 WLR 2024 at [78]). Art 37 of the UN Convention on the Rights of the Child provides as follows with respect to the right to liberty:

> "**Article 37**
>
> States Parties shall ensure that:
>
> (a) .../
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

35. Whilst Art 5(1)(d) of the ECHR provides a specific example of the detention of children, namely for the purposes of educational supervision, that example is not meant to denote that educational supervision is the only purpose for which a child may be detained (see *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2008) 46 EHRR 449). It has further been held that the concept of educational supervision must embrace many aspects of the exercise by a local authority of parental rights for the benefit and protection of the child concerned (see *Koniarska v United Kingdom* (2000) Application No 33670/96 (unreported). Within this context, with respect to s 25 of the Children Act 198, in *Re K (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377 Judge LJ (as he then was) observed as follows at [107] and [108]:

> "[107] This goes far beyond school. It is not just about the restriction on liberty involved in requiring a reluctant child to remain at school for the school day. It arises in the context of the responsibilities of parents which extend well beyond ensuring the child's attendance at school. So it involves education in the broad sense, similar, I would respectfully suggest, to the general development of the child's physical, intellectual, emotional, social and behavioural abilities, all of which have to be encouraged by responsible parents, as part of his upbringing and education, and for this purpose, an appropriate level of supervision of the child to enhance his development, where necessary, by restricting his liberty is permitted. If less were involved than this, there would be no purpose in including "educational supervision" as an express restriction on the right of a minor to liberty: the recognition of "custodial rights" and parental responsibilities would have sufficed. It is, of

> course, quite unreal for anyone to decide in theory, or for rigid guidelines to be laid down in advance, about the appropriate level of educational supervision which may be required by an individual child. The purpose of this order, and its implementation by the local authority, is to provide the best available environment to enable K's education, both in the narrow and broad senses, under the degree of supervision and control necessary to avoid harm or injury to himself, and to improve his prospects of avoiding both in the long term as well as the immediate future...
>
> [108] In summary the normal standards of acceptable parental control are undiminished by, indeed consistent with, the Convention. Therefore the restriction in article 5(1)(d) is specifically directed to the situation of those minors who are beyond such normal control. Prosecution and punishment do not invariably present the most efficacious solution to the behavioural problems of children and young persons, and their long term development, whether viewed entirely as a matter of their own self-interest or the general benefit of the community as a whole. There is much to be gained if the underlying causes of the misbehaviour of a child or young person can be examined and addressed. Hence the need to allow restrictions on the liberty of minors with such problems, which goes beyond normal parental control and allows for the educational supervision. The Convention is not an appropriate instrument for spelling out precisely what form this may take or its limits. As Mr Garnham's helpful analysis of the differing procedures adopted in many of the countries adherent to the Convention demonstrates, there are different traditions and regimes for dealing with troublesome as well as the criminal young. All these command respect, and the Convention is not an appropriate instrument for spelling out precisely what form this should take, and which particular regime is acceptable."

36. I pause to note within this context that deprivation of liberty for the purposes of educational supervision is not recognised by Art 37 of the UNCRC or in any other international human rights instrument, that deprivation of liberty for the purposes of securing a child's welfare has been deprecated by the UN Committee on the Rights of the Child and that the decision in *Koniarska v United Kingdom* has been criticised as stretching the concept of educational supervision beyond its natural meaning (see Van Bueren, G. *Child Rights in Europe* (2007)).

37. 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.

38. 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]).

39. 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. Within this context I accept that the following, non-exhaustive, list of factors set out in Ms Heaton and Mr Spencer's Skeleton Argument will be relevant in this case:

    i) The extent to which the child is actively prevented from leaving the placement and the extent to which efforts are made to return the child if they leave;

    ii) The extent to which forms of restraint are utilised in respect of the child within the placement and their nature, intensity, frequency and duration;

    iii) The nature and level of supervision that is in place in respect of the child within the placement;

    iv) The nature and level of monitoring that is in place in respect of the child within the placement;

    v) The extent to which rules and sanctions within the placement differ from other age appropriate settings for the child;

    vi) The extent to which the child's access to mobile telephones and the Internet is restricted or otherwise controlled;

    vii) The degree of access to the local community and neighbourhood surrounding the placement and the extent to which such access is supervised;

    viii) The extent to which other periods outside the placement are regulated, for example transport to and from school.

40. With respect to the application of the 'acid test' to children and young people it will be seen that, as Cobb J made clear in *Re RD (Deprivation or Restriction of Liberty)*, the courts have utilised comparators against which to measure the elements of that test in respect of the subject child. In *Re A-F* at [33] Sir James Munby stated that:

> "...whether a state of affairs which satisfies the "acid test" amounts to a "confinement" for the *Storck* component (a) has to be determined by comparing the restrictions to which the child in question is subject with the restrictions that would apply to a child of the same "age", "station", "familial background" and "relative maturity" who is "free from disability".

41. Within this context, in *Cheshire West and Chester v P* Lord Kerr observed that "All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances". Childhood is not a single, fixed and universal experience between birth and majority but rather one in which, at different stages, in their lives, children require differing degrees of protection, provision, prevention and participation. Within this context, with respect to the subject child, each case must be decided on its own facts. However, with respect to the question of a comparator, in *Re A-F* Sir James Munby sought to lay down a "rule of thumb"

whereby, having observed that a child under the age of 15 years old is not 'free to leave' in the context used in *Cheshire West and Chester v P*, he noted that a child aged ten, even if under pretty constant supervision, is unlikely to be "confined", a child aged 11, if under constant supervision, may, in contrast, be so "confined, though the court should be astute to avoid coming too readily to such a conclusion and once a child who is under constant supervision has reached the age of 12, the court will more readily come to such a conclusion.

Cross Border Secure Placements in Scotland

42. In *Re X (A Child) and Y (A Child)* [2016] EWHC 2271 (Fam) Sir James Munby considered the cases of two children, one of whom was the subject of a secure accommodation orders pursuant to s 25 of the Children Act 1989 and one of whom was the subject of an order under the inherent jurisdiction of the High Court authorising the deprivation of his liberty, both children being placed in accommodation in Scotland approved as 'secure accommodation' for the purposes of the Children's Hearings (Scotland) Act 2011 and the Secure Accommodation (Scotland) Regulations 2013. It is important to note the following matters in respect of the decision in *Re X (A Child) and Y (A Child)*:

i) As I have noted, child X was securely accommodated under a secure accommodation order pursuant to s 25 of the Children Act 1989. Child Y was securely accommodated pursuant to an order made under the inherent jurisdiction of the English High Court.

ii) Within this context, the English court was concerned with three questions. First, can a judge in England make a secure accommodation order under s 25 of the Children Act 1989 if the child is to be placed in a unit in Scotland, second, if not, can the same outcome be achieved by use of the inherent *parens patriae* jurisdiction of the English High Court and, third, in either case, will the order made by the English judge be recognised and enforced in Scotland?

iii) The English court in *Re X (A Child) and Y (A Child)* concluded that a judge in England could not, under the legislation then current, make a secure accommodation order under s 25 of the Children Act 1989 if the child was to be placed in secure accommodation in Scotland.

iv) The English court further concluded that, whilst in principle, a judge in exercise of the inherent jurisdiction of the High Court can make an order directing the placement of a child in secure accommodation in Scotland and, in principle, a judge in exercise of the inherent jurisdiction can make an order directing the placement of a child in *non*-secure accommodation in Scotland, neither the English or Scottish legislative provided for the recognition and enforcement in Scotland orders made under the inherent *parens patriae* jurisdiction of the English High Court.

v) Within this context, the English court accepted expert evidence on Scottish law to the effect that under the legislative scheme in force at the time *Re X (A Child) and Y (A Child)* was decided (i) orders made by the English court authorising detention of an English child in secure accommodation in Scotland whether made under s 25 of the Children Act 1989 or under the inherent

> jurisdiction of the English High Court are not capable of being recognised under Scottish law whether by way of mirror orders or registration, (ii) what is termed the inherent jurisdiction of the higher courts in Scotland would not extend to the recognition and enforcement of the orders by those courts and (iii) there is no statutory basis for recognition and enforcement of such orders in Scotland.

43. Within this context, in *Re X (A Child) and Y (A Child)* the court's attention was drawn to the *nobile officium*, the extraordinary jurisdiction of the Court of Session and the High Court of Justiciary in Scotland. In this respect, Sir James Munby concluded as follows:

> "[70] In the circumstances it seems to me that the only way in which these matters can be taken forward, whether in these two cases or more generally with a view to finding solutions in other comparable cases, is for an application to be made by the local authorities to the Court of Session seeking to invoke the *nobile officium.* Once the outcome of that application is known, the matters can be listed again before me to determine what should be done in the light of the Court of Session's judgment. One important question which will have to be considered at that stage, in the event that the Court of Session declines to exercise the *nobile officium* and does not identify any other basis for recognition and enforcement in Scotland of a secure accommodation order made by the English court under the inherent jurisdiction, is whether it is appropriate for the English court to be making such an order at all in those circumstances."

44. It is important to note that the conclusions reached by the court in *Re X (A Child) and Y (A Child)* were that, within the context of the statutory regime then in place in England, (i) a judge in England could not make a secure accommodation order under s 25 of the Children Act 1989 if the child was to be placed in secure accommodation in Scotland, (ii) in principle, a judge in the exercise of the inherent jurisdiction of the High Court can make an order directing the placement of a child in secure accommodation in Scotland and, in principle, a judge in exercise of the inherent jurisdiction can make an order directing the placement of a child in *non*-secure accommodation in Scotland, (iii) that neither the English or Scottish legislative provisions provided for the recognition and enforcement in Scotland orders made under the inherent *parens patriae* jurisdiction of the English High Court and (iv) that, accordingly, the Court of Session should be petitioned to determine whether it was prepared to invoke the *nobile officium* to remedy those situations. Within this context, Sir James Munby expressly recognised that the court might decline to exercise the *nobile officium* and not identify any other basis for recognition and enforcement in Scotland of a secure accommodation or an order made by the English court under the inherent jurisdiction.

45. Accordingly, *Re X (A Child) and Y (A Child)* is *not*, as suggested at p 174 of the current edition of the Family Court Practice, authority for the bare proposition that a child may be placed, without more, in a placement in Scotland not approved as secure accommodation by the Scottish Ministers pursuant to an order authorising the deprivation of the child's liberty made pursuant to inherent jurisdiction of the English High Court. Rather, it is authority for the proposition that whilst the *English* court has power to make such an order, unless the Inner House of the Court of Session in

Scotland agrees to invoke the *nobile officium* in respect of such a course of action, such placement may be without legal authority in Scotland.

46. Within the foregoing context, following the decision in *re X (A Child) and Y (A Child)*, in *Cumbria Country Council and Ors, Re Children X, J, L and Y* the Inner House of the Court of Session in Scotland examined three petitions to the *nobile officium* in respect of four children who were placed in secure accommodation in Scotland following orders made by the High Court in England (two of which petitions were in respect of X and Y, the children whose cases had been considered by the English High Court in *Re X (A Child) and Y (A Child)*). Once again, it is important to note the following matters in respect of the decision in *Cumbria Country Council and Ors, Re Children X, J, L and Y*:

i) Whilst in *Re X (A Child) and Y (A Child)* Sir James Munby had formulated the 'way forward' as being to petition the Court of Session with a view to determining whether it would invoke the *nobile officium* in respect of secure accommodation orders made in England pursuant to s 25 of the Children Act 1989 *or* orders made under the inherent jurisdiction of the English High Court, in *Cumbria Country Council and Ors, Re Children X, J, L and Y* Scottish court ultimately dealt only with the position in respect of secure accommodation orders made by the High Court in England pursuant to s 25 of the Children Act 1989 and *not* deprivation of liberty authorisations made by the English High Court under the inherent jurisdiction. This was by reason of the fact that child Y in *Re X (A Child) and Y (A Child)*, who had been the child accommodated in Scotland by way of an order under the inherent jurisdiction, was no long securely accommodated and hence the case of child X became the test case before the Court of Session;

ii) Within this context, *Cumbria Country Council and Ors, Re Children X, J, L and Y* concerned Scottish placements approved as 'secure accommodation' under the relevant Scottish law and *not* Scottish residential placements that were not so approved but which amounted to a deprivation of liberty for the purposes of Art 5 of the ECHR;

iii) The legislative lacuna that the Court of Session was thus examining in *Cumbria Country Council and Ors, Re Children X, J, L and Y* (described by the Court of Session as a "major deficiency") was the absence of a provision for the recognition in Scotland of English secure accommodation orders made pursuant to s 25 of the Children Act 1989 requiring a child to reside in secure accommodation and *not* the absence of provision for the recognition in Scotland of deprivation of liberty authorisations made by the English High Court under its inherent jurisdiction in respect of children placed in non-secure placements in Scotland;

iv) In *Cumbria Country Council and Ors, Re Children X, J, L and Y* the Inner House of the Court of Session (as it made explicit at [4]) was concerned only with *interim* orders. Further, the Court of Session determined within this context only that there was "a clear *prima facie* case for application of the *nobile officium*" and that, in such circumstances, the balance of convenience favoured the making of an interim order having regard to the individual circumstances of the children concerned;

v) The interim orders granted by the Inner House of the Court of Session were not opposed by the Lord Advocate and the Advocate General;

vi) In the circumstances, in examining whether relief should be granted under the *nobile officium*, the Inner House of the Court of Session was concerned only with the question of whether, in the interim and in the particular circumstances of the case before it, that jurisdiction should be invoked to provide a means of recognising secure accommodation orders made in England pursuant to s 25 of the Children Act 1989. It was *not* concerned with the much wider question of whether the *nobile officium* was capable of being, and should be invoked as a matter of course to recognise deprivation of liberty authorisations made by the English High Court under the inherent jurisdiction in respect of placements in Scotland, which question had fallen away by reason of a change in child Y's circumstances.

47. As I noted above, *Re X (A Child) and Y (A Child)* is not authority for the bare proposition that a child may be placed, without more, in a placement in Scotland not approved as secure accommodation by the Scottish Ministers pursuant to an order authorising the deprivation of the child's liberty made pursuant to the inherent jurisdiction of the English High Court. Rather, it is authority for the proposition that whilst the English court has power to make such an order, unless the Inner House of the Court of Session in Scotland agrees to invoke the *nobile officium* in respect of such a course of action, such placement may be without legal authority in Scotland. Within this context, and again contrary to the suggestion at p 174 of the current edition of the Family Court Practice, *Cumbria Country Council and Ors, Re Children X, J, L and Y* is not authority for the proposition that any orders made under the inherent jurisdiction of the English High Court authorising the deprivation of liberty of a child in a placement in Scotland not approved as secure accommodation by the Scottish Ministers will be recognised under the *nobile officium* jurisdiction. Rather, as Mr Inglis correctly points out, the *ratio decidendi* of the case is that where there is demonstrated a *prima facie* case that the *nobile officium* might apply to a particular type of order made under the inherent jurisdiction of the English court, and the balance of convenience favours an interim order pending full argument, the court is able grant interim order under the *nobile officium*.

48. Before leaving *Cumbria Country Council and Ors, Re Children X, J, L and Y*, having regard to the issues that fall for determination by this court at this stage of these proceedings, and in particular to the parties' submissions regarding the merits of an adjournment to permit a petition to the Inner House of the Court of Session by the local authority, I also note the following passages from the judgment of the Inner House of the Court of Session.

49. First, and acknowledging that the Court of Session goes on to make clear that the power under the *nobile officium* is confined to *casus improvisus* in the true sense of that term, that is to say, cases that have not been foreseen and therefore have not been provided for, I note the following observations by the Court of Session in respect of the general nature and application of the *nobile officium*:

> "[21] We would make two further observations about the *nobile officium* at a general level. First, because of the underlying equitable nature of the jurisdiction, we are of opinion that it is no bar to its application that no

> precedent exists that is applicable to the precise circumstances of the case. That conclusion is supported by the fact that the primary use of the jurisdiction is to deal with unforeseen circumstances, which obviously may be unprecedented. Nevertheless, before the jurisdiction is exercised, the court will normally consider whether there has been an analogous application in the past, and if there has that will support the exercise of the jurisdiction. If there has been no previous analogous decision, however, that is not decisive: in such a case the court must decide whether injustice and oppression will result if it does nothing, and if that is so there is clearly a good case for the invocation of the jurisdiction. On the applicability of precedent to the *nobile officium*, we should record that we have obtained great assistance from the discussion at pages 241-252 of Professor Stephen Thomson's work, *The Nobile Officium*, the first monograph to be published on the subject."
>
> [22] Secondly, in view of the equitable nature of the *nobile officium*, we are of opinion that it should be used in a practical manner, to address the particular situation that is either unprecedented or has not been adequately foreseen. Cases of the latter sort can result from the failure of those involved in a particular transaction to foresee what might happen, as with the cy-près jurisdiction, or with the general failure of established law or existing statutes to deal with a particular situation. In either event, the focus should be on providing a practical and workable solution to the problem that has arisen."

50. Second, I note the following passage from the judgment of the Court of Session dealing with the use of the *nobile officium* to safeguard children:

> "[25] The second category of case where the use of the *nobile officium* is relevant to the present case is where it has been used to safeguard the welfare of children. In *Beagley v Beagley*, 1984 SC (HL) 69, Lord Robertson stated (at page 83):
>
> > 'There is an inherent power in the Court of Session to exercise in its *nobile officium*, as *parens patriae*, jurisdiction over all children within the realm, and an application by anyone able to demonstrate an interest may bring a petition to the *nobile officium* if the interests of a child are involved or threatened'.
>
> The *parens patriae* jurisdiction appears to have had a different origin from the *nobile officium*; the former was technically derived from the Court of Exchequer in Scotland, which in turn derived the jurisdiction from the Crown, whereas the latter is part of the inherent powers of the Court of Session as the supreme civil court in Scotland: Thomson, op. cit, at 118-121; Law Hospital NHS Trust v Lord Advocate, 1996 SC 301, per LP Hope at 314, Lord Clyde at 324 and Lord Cullen at 328. Nevertheless, in practice, the *parens patriae* jurisdiction is generally subsumed into the *nobile officium*.
>
> [26] At a practical level, the need for a legal mechanism to secure the welfare of children is very obvious, and the parens patriae jurisdiction has

> developed in parallel in both Scotland and England and Wales to achieve this end. This is well illustrated by the present proceedings. The jurisdiction may apply to a wide range of cases, in greatly varied circumstances. The critical objective is to ensure the welfare of the child concerned, in the particular circumstances which have arisen. This requires a practical approach, so that procedural niceties are not allowed to stand in the way of the fundamental policy that underlies the jurisdiction."

51. Third, and within this context, the Court of Session observed as follows with respect to one of the justifications for its conclusion that there was a *prima facie* case for the application of the *nobile officium*:

> "[31] We are further of opinion that the application of the *nobile officium* in cases such as the present is also justified by the *parens patriae* jurisdiction. Under that jurisdiction the Court of Session has a duty to safeguard the interests and welfare of any child in Scotland. In the present cases children have been placed in secure accommodation in Scotland by the High Court in England in order to ensure their welfare, for reasons that are explained at length in the decisions of the High Court and accompanying papers. In order to make those decisions effective, and thus secure the welfare of the children, it appears to us to be imperative that the Court of Session should make use of the *parens patriae* jurisdiction to ensure that the children are properly looked after, in secure accommodation, and to provide proper legal authority to achieve that end."

52. Finally, in relation to the relevant law, as noted by the Court of Session in *Cumbria Country Council and Ors, Re Children X, J, L and Y* at [5], at the time of the decision "both Scottish Ministers and the United Kingdom government recognised the deficiencies of the existing legislation and that discussions had begun with a view to finding a permanent legislative solution for the problem". Within this context, the Children and Social Work Act 2017 amended s 25 of the Children Act 1989 to provide for the placement of children in Scotland pursuant to secure accommodation orders made under the section by courts in England. Within this context, the position examined in *Cumbria Country Council and Ors, Re Children X, J, L and Y* as requiring the invocation of the *nobile officium*, namely placement in Scotland under secure accommodation orders made pursuant to s 25 of the Children Act 1989, no longer arises.

53. No similar statutory provision was made by way of amendment in the Children and Social Work Act 2017 in respect of children placed in Scotland in secure accommodation (or non-secure accommodation) who are the subject orders authorising the deprivation of their liberty made by the English High Court. Further, for the reasons I have already outlined, the question of whether the position of such children would justify the application of the *nobile officium* was not, in the end, the subject of consideration in *Cumbria Country Council and Ors, Re Children X, J, L and Y*. It is that legal issue that accordingly remains live and which now lies at the heart of the issues in this case.

DISCUSSION

54. As I announced at the conclusion of the hearing, having considered carefully the written and oral submissions of leading and junior counsel, and having regard to the substantive and addendum expert reports of Mr Inglis, I determined, on balance, that the regime that pertains in M's current placement does act to deprive her of her liberty for the purposes of Art 5 of the ECHR, that the application to adjourn these proceedings should be allowed to permit the local authority to petition the Inner House of the Court of Session in Scotland for an order finding and declaring that the measures ordered by the High Court in respect of M should be recognised and enforceable in Scotland as if they had been made by the Court of Session and that, in the circumstances and in the meantime, the interim declaration authorising the deprivation of M's liberty should be continued pending the determination of petition in Scotland. My reasons for so deciding are as follows.

Deprivation of Liberty

55. Having regard to all the circumstances, and on balance, I am satisfied that M is at present deprived of her liberty at '[the placement]'.

56. In this case it is the first element of the test set out in *Storck*, an objective element of confinement to a certain limited place for a not negligible period of time, that is the key issue (M not consenting to confinement and being the subject of an interim care order upon the application of the State). Within this context, as Cobb J noted in *Re RD (Deprivation or Restriction of Liberty)* in the context of the question of continuous supervision and control Cheshire West and Chester v P:

> "...in this area, it is increasingly easy to identify and articulate the exalted legal principles in play, as I have endeavoured to do above, it is a far more challenging exercise to apply them to the individual facts of a given case."

57. That is the case here. I reprise and accept the following list of relevant features in respect of M, who is rising 14 years old, set out in the submissions of Ms Heaton and Mr Spencer on behalf of the local authority:

i) M is the subject of 2:1 staff supervision whilst in the placement. This means that, subject to 30 minute walks in the garden and a 30 minute period in the local town once per week as noted below, M is under almost constant supervision when in the placement;

ii) Staff are always aware of M's whereabouts and will intervene by means of persuasion if she attempts to leave the placement (or, indeed, if she attempts to leave whilst out of the placement). M is not *physically* restrained from leaving but is encouraged to return if she leaves (and has always done so to date);

iii) When in her room staff will remain present in the corridor outside. M is able to lock and unlock her own bedroom but staff are able to and will unlock the room if they are concerned about her welfare. If she is locked in her room M will be observed every 15 minutes by staff unlocking the door;

iv) M is monitored by staff during the night by way of a 'wake and watch' provision during the course of the night system. This constitutes a significant level of supervision of M during the course of the night. The doors to the placement are locked at night (albeit there is no suggestion that this is to ensure M does not leave as opposed to ensuring the general safety and security of the placement);

v) All challenging behaviour is managed and certain behaviour is physically restrained. Restraint is used in the placement to protect M or others if her behaviour escalates to the extent that she is at risk of harming herself or others. M has been the subject of physical restraint in seven occasions, the last being 20 April 2019 for approximately 18 minutes;

vi) M's access to the Internet is supervised in the placement and whilst at school;

vii) M is transported to and from school by two members of staff from the placement with those staff members remaining at school if M's behaviour requires it. Once again, this represents a significant degree of supervision within the context of an ordinary activity;

viii) When M attends a school activity or other outside activity she is accompanied and supervised by two members of staff;

ix) M is permitted 30 minutes each day in which she is able to be in the grounds of the placement and is permitted to be by herself in the local town for 30 minutes each week with two supervising staff remaining 'in the vicinity'.

58. Within the foregoing context, and whilst I accept that M has a short period in the community each week where supervision is lessened for 30 minutes, it is plain that M's movements are significantly restricted and that she is the subject of close supervision by the staff at the unit for the vast majority of any given day, which supervision continues to and from school with supervisors also present at school, and with close monitoring throughout the night. Within this context, having regard to 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]), I am satisfied that the regime of supervision, which can be characterised as at least 'thorough', if not 'unremitting', 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. Further, whilst I accept that M is not locked in the placement, it is the case that, if she attempts to leave, persuasion by staff will be used in an attempt to stop her doing so. Finally, as I have noted, M is subject to the use of physical restraint for relatively extended periods where the management of her behaviour requires.

59. Within this context, and whilst certain of the features of M's life may be said not to differ greatly from the relevant comparator, I am satisfied that comparing the situation in which M finds herself with the ordinary life of a 13 year old young person living at home with her 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. In particular, it is not the case that a 13 year old girl would ordinarily be

the subject of the almost constant close supervision whilst at home, including the presence of supervisors outside her room when she is in it and being the subject of 'wake and watch' close monitoring throughout the night. Likewise, it is not the case that a 13 year old girl would be the subject of close supervision outside the home at all times, including transport to and from school with two supervisors remaining at school, save for a single, defined and highly prescribed period once each week. Physical restraint for periods upwards of 15 minutes in order to control behaviour would likewise not ordinarily feature in the life of a 13 year old girl.

60. Within this context, and for the reasons I have given, I am satisfied that the court must conclude, on balance, that the living and care arrangements that are in place for M at '[the placement]' amount to a 'confinement' so as to give rise to a deprivation of her liberty for the purposes of Art 5 of the ECHR.

Adjournment

61. I am satisfied that the local authority's application to adjourn these proceedings should be granted in order to permit it to petition the Inner House of the Court of Session for orders finding and declaring that the measures ordered by the English High Court in respect of M should be recognised and enforceable in Scotland as if they had been made by the Court of Session.

62. It is plainly not the task of this court to decide whether, as a matter of law, the Scottish court has the power to apply the *nobile officium* in the circumstances of the present case, namely where the placement of a child in Scotland amounts to a deprivation of her liberty for the purposes of Art 5 of the ECHR and that deprivation of liberty has been authorised by an order made under the inherent jurisdiction of the High Court but where the placement is *not* a placement approved by the Scottish Ministers for the provision of secure accommodation of children for the purposes of the relevant Scottish legislation. That is a matter solely for the sovereign courts of Scotland. Rather, the evaluation with which this court is presently concerned is whether there are sufficient prospects of the local authority successfully petitioning the Inner House of the Court of Session to this effect to justify an adjournment of these proceedings, as opposed to beginning now the task of identifying a placement in England and Wales that can meet M's needs. In my judgment, the following matters indicate that there is indeed merit in granting an adjournment to permit the local authority time to petition the Scottish court.

63. I have of course paid careful regard to the expert opinion of Mr Inglis and the clear and articulate conclusions he sets out in his substantive report and in his addendum. In *Re X* at [12] Sir James Munby observed as follows regarding the role of the expert in proceedings of this nature:

> "As will be appreciated, there are always two aspects to a cross-border issue such as the one I am concerned with here. Can the court in country A (in the present case, England) make an order to take effect in country B (in this case, Scotland)? If so, will such an order be recognised and enforced in country B (Scotland)? The first question is to be determined by the law of country A (England); the second is one to be determined by the law of country B (Scotland). For an English judge, the content of the law of England (including the English law relating to private international law, the

> conflict of laws) is a matter of law, to be ascertained in the light of legal argument. For an English judge, the content of the law of a foreign country, here Scotland (including the Scottish law relating to private international law) is a matter of fact, to be ascertained in the light of expert evidence."

64. Within this context, Mr Inglis sets out careful, cogent and considered reasons for his opinion that a petition to the Court of Session seeking the application of the *nobile officium* is very unlikely to succeed and should not be laid. I do not underestimate those points and the arguments he articulates appear to me to have some force. However, in my judgment, there are a number of important matters that speak against the pessimistic analysis he lays out.

65. First, and most importantly, whilst the conclusions set out by Mr Inglis, and in particular those based on his analysis of the impact of *casus improvisus* in the particular circumstances of this case, merit respect, there are also, it seems to me, potentially cogent arguments to be made in favour of the application of the *nobile officium* in the circumstances of this case as highlighted by leading counsel in these proceedings. In particular:

i) It is plain on a reading of the case law that the *nobile officium* is a flexible jurisdiction. In *Re X* at [69] Sir James Munby recounts the views of Lord Hope of Craighead that the extraordinary jurisdiction of the Court of Session and the High Court of Justiciary in Scotland that is the *nobile officium* allows those courts to do something out of the ordinary to prevent oppression or injustice where no other remedy or procedure is available and that it is open ended with no fixed rules or limits that govern its exercise.

ii) As made clear by the Court of Session in *Cumbria Country Council and Ors, Re Children X, J, L and Y* at [21], because of the underlying equitable nature of the *nobile officium* jurisdiction it is no bar to its application that no precedent exists that is applicable to the precise circumstances of the case. The primary use of the jurisdiction is to deal with unforeseen circumstances, which obviously may be unprecedented.

iii) As also made clear in *Cumbria Country Council and Ors, Re Children X, J, L and Y* at [22] the equitable nature of the *nobile officium* means that it should be used in a practical manner, to address the particular situation that is either unprecedented or has not been adequately foreseen. The focus should be on providing a practical and workable solution to the problem that has arisen. Again, I acknowledge Mr Inglis' views regarding the impact of *casus improvisus* in this context.

iv) Mr Inglis opines in his addendum report that the issue of the relationship between the *parens patriae* jurisdiction and the *nobile officium* is an area of controversy in which further litigation is likely.

v) Within this context, it is apparent in the judgment in *Cumbria Country Council and Ors, Re Children X, J, L and Y* that there is some debate as to the extent to which the *parens patriae* survives in Scotland as a jurisdiction discrete from the *nobile officium*, at the very least *Cumbria Country Council and Ors, Re Children X, J, L and Y* makes clear that, in so far as the former is subsumed in

the latter, the operation of the latter will be heavily informed by the demands of the former such that, at [25] and [31], the Court of Session recalled that there is an inherent power in the Court of Session to exercise in its *nobile officium*, as *parens patriae*, jurisdiction over all children and that the application of the *nobile officium* may be justified by the *parens patriae* jurisdiction, under which jurisdiction the Court of Session has a duty to safeguard the interests and welfare of any child in Scotland.

vi) Within this context, with respect to the *parens patriae* jurisdiction itself, in *Cumbria Country Council and Ors, Re Children X, J, L and Y* at [26] the Court of Session further observed that at a practical level, the need for a legal mechanism to secure the welfare of children is very obvious, that the *parens patriae* jurisdiction has developed in parallel in both Scotland and England and Wales to achieve this end, that jurisdiction may apply to a wide range of cases, in greatly varied circumstances and that the critical objective is to ensure the welfare of the child concerned in the particular circumstances which have arisen. The court further observed that this requires a practical approach, so that procedural niceties are not allowed to stand in the way of the fundamental policy that underlies the jurisdiction. As such, and accepting the following observations were made in the context of orders made under s 25 of the Children Act 1989 when unamended by the Children and Social Work Act 2017, at [31] the Court of Session observed that:

> "In the present cases children have been placed in secure accommodation in Scotland by the High Court in England in order to ensure their welfare, for reasons that are explained at length in the decisions of the High Court and accompanying papers. In order to make those decisions effective, and thus secure the welfare of the children, it appears to us to be imperative that the Court of Session should make use of the *parens patriae* jurisdiction to ensure that the children are properly looked after, in secure accommodation, and to provide proper legal authority to achieve that end."

66. Within this context, whilst not seeking to downplay the points raised by Mr Inglis, particularly in relation to the significance of the *casus improvisus*, and again making clear that the legal determination as to the applicability of the *nobile officium* is the exclusive province of the Scottish courts, it does seem to me that the foregoing points at least allow this court to be satisfied the proposed petition of the local authority is sufficiently arguable before the Inner House of the Court of Session to justify an adjournment to permit such an application to be made to the Scottish court. Further, beyond these aspects of the judgment in *Cumbria Country Council and Ors, Re Children X, J, L and Y* that support such a conclusion, in my judgement there are a series of other very important factors that justify adjourning these proceedings to allow the local authority to petition the Inner House of the Court of Session in Scotland.

67. First, the question of whether the Inner House of the Court of Session would be willing to invoke the *nobile officium* in circumstances where the placement of a child in Scotland amounts to a deprivation of her liberty for the purposes of Art 5 of the ECHR, which deprivation of liberty has been authorised by an order made under the inherent jurisdiction of the High Court but where the placement is *not* a placement

approved by the Scottish Ministers for the provision of secure accommodation of children for the purposes of the relevant Scottish legislation, was left open in *Cumbria Country Council and Ors, Re Children X, J, L and Y*. This was not because the Court of Session declined to deal with the issue, but because it did not need to do so in circumstances where the position of child Y had changed. Within this context, whilst it is clear from the judgment in *Re X* that Sir James Munby anticipated this situation would also be the subject of consideration by the Scottish court in the context of the *nobile officium*, it was not.

68. Second, the legal point to which this case gives rise is not academic and is, in fact, of great moment for children placed in non-secure placements in Scotland with the consequent deprivation of their liberty authorised by an order made under the inherent jurisdiction of the English High Court, and for those that currently care for them. As noted by the Court of Session in *Cumbria Country Council and Ors, Re Children X, J, L and Y* at [2], again in context of orders made under s 25 of the Children Act 1989 when unamended by the Children and Social Work Act 2017:

> "This gives rise to a fundamental conflict: the English courts have decided that it is necessary to keep the children in secure accommodation to ensure their welfare, but doing that without legal authority is a clear infringement of the children's rights to personal liberty. That raises an obvious conflict, between a child's welfare and the child's right to personal liberty. That conflict can be shortly stated, but it is of fundamental importance. The conflict creates a very obvious dilemma for the institutions in which the children are held: unless legal authority is given in Scotland for the detention of the children those authorities will be acting illegally if they prevent them from absconding."

69. Third, and within the foregoing context, this court understands that the legal uncertainties that currently pertain in respect of M's placement also pertain in relation to a number of children placed in Scotland under the authority of orders made under the inherent jurisdiction of the English High Court. This court is aware anecdotally, for example, of a number of cases on the North Eastern Circuit in which this issue has arisen. It is likely that there will be other cases on the Northern Circuit and perhaps elsewhere in England and Wales. Within this context, it is in the interests of these children that the legal issues set out above are the subject of clarification, whether that be on the basis of confirmation that the *nobile officium* can be engaged in these circumstances or confirmation that it cannot. Even if the latter is the position, further planning with respect to this constituency of children can then take place in the context of legal certainty.

70. Fourth, within the specific context of this case, her current placement is important for M in circumstances where, in relative terms, she has made progress in the placement and all professionals involved are satisfied that the placement is the correct one for M in the effort to advance her best interests. In these circumstances, as Mr Inglis rightly surmises in his expert report, this court is anxious to explore any approach which will enables the lawful implementation of its assessment as to what is in M's bests interests. This brings into even sharper focus the merits of permitting an adjournment to allow the local authority to petition the Court of Session with a view to regularising M's legal position in Scotland in a placement that is plainly meeting her needs.

71. Fifth and finally, it has long been recognised and appreciated that it is a fundamental tenet of international private law that children's best interests are served by comity and co-operation between different legal jurisdictions. Whilst not of direct application in this case, domestic and international legal instruments recognising these legal norms are regularly invoked in both the jurisdiction of Scotland and the jurisdiction of England and Wales.

72. For all these reasons, I am satisfied that the local authority's application to adjourn these proceedings should be granted in order to permit it to petition the Inner House of the Court of Session for orders finding and declaring that the measures ordered by the High Court in respect of M should be recognised and enforceable in Scotland as if they had been made by the Court of Session.

73. Finally, if the petition the local authority intends to lay before the Inner House of the Court of Session is *not* successful then, as noted above, Sir James Munby observed in *Re X* at [70]:

> "One important question which will have to be considered at that stage, in the event that the Court of Session declines to exercise the nobile officium and does not identify any other basis for recognition and enforcement in Scotland of a secure accommodation order made by the English court under the inherent jurisdiction, is whether it is appropriate for the English court to be making such an order at all in those circumstances."

74. Within this context, and in response to the foregoing observations by Sir James Munby in *Re X*, in *Cumbria Country Council and Ors, Re Children X, J, L and Y* at [18] the Inner House of the Court of Session further observed that:

> "It was to deal with that situation that the suggestion was made in the English proceedings that the appropriate remedy in Scotland might be a petition to the *nobile officium*. Sir James Munby P expressed the view that this appeared to be the only way in which the present matters could be taken forward. He noted that, if such a remedy were not available, the English court would have to consider whether it was appropriate to make any order for the placing of children in secure accommodation in Scotland. Furthermore, because this area of law is governed by Article 5 of the European Convention on Human Rights, any deprivation of liberty required to be subject to regular judicial monitoring and review. That raised a potentially difficult question as to whether in such a case that judicial function should be vested in the English court or the Scottish court, or under some joint arrangement. In favour of the English court was the fact that it was the court responsible for the existing proceedings; in favour of the Scottish court was the fact that it was the court that would have to be responsible for enforcing the secure accommodation orders, if need be by the use of coercion."

75. These are vexed questions that must await the outcome of the decision of the Court of Session, and will fall to be considered if the petition to invoke the *nobile officium* is declined by that Court.

Interim Relief

76. I am satisfied that, pending the outcome of the petition by the local authority to the Inner House of the Court of Session it is appropriate to continue the interim orders authorising M's deprivation of liberty at '[the placement]'. It is plain from the judgment of Sir James Munby in *Re X* that the *English* High Court has jurisdiction to make orders under the inherent jurisdiction authorising the deprivation of M's liberty in her current placement, the outstanding question being whether the *Scottish* court will be willing to find and declare that the measures ordered by the High Court in respect of M should be recognised and enforceable in Scotland as if they had been made by the Court of Session by application of the *nobile officium*. In circumstances where that legal question remains to be determined in the manner that I have described, and where the current placement is plainly meeting the welfare needs of M, I am satisfied that the balance of convenience in this case clearly favours the continuation of interim orders authorising the deprivation of M's liberty in that placement until such time as the Court of Session has determined the petition of the local authority.

CONCLUSION

77. For all the reasons I have given, I am satisfied that M is currently deprived of her liberty for the purposes of Art 5 of the ECHR in her placement in Scotland. I am further satisfied that it is appropriate to adjourn this matter to enable the local authority to petition the Inner House of the Court of Session in Scotland and I adjourn these proceedings accordingly. I am satisfied it is appropriate to continue the interim orders authorising the deprivation of M's liberty in her current placement and I declare that it is lawful and in M's best interests to be deprived of her liberty by Salford City Council at "[the placement]" in Scotland and that such continued deprivation of liberty is authorised. In depriving M of her liberty, the local authority is directed by this court to use the minimum degree of force or restraint required. The use of such force/restraint is lawful and in her best interests provided always that the measures are (a) the least restrictive of the child's rights and freedoms, (b) proportionate to the anticipated harm, (c) the least required to ensure the child's safety and that of others and (d) respectful of the M's dignity.

78. Finally, pending the outcome of the local authority's petition to the Court of Session, it is important that it is understood what *Re X (A Child) and Y (A Child)* and *Cumbria Country Council and Ors, Re Children X, J, L and Y* are and, importantly, are *not* authority for.

79. As I have set out above, *Re X (A Child) and Y (A Child)* is not authority for the bare proposition that a child can be placed, without more, in a placement in Scotland not approved as secure accommodation by the Scottish Ministers pursuant to an order authorising the deprivation of the child's liberty made pursuant to inherent jurisdiction of the English High Court. Rather, it is authority for the proposition that, whilst the *English* court has power to make such an order, unless the Inner House of the Court of Session in *Scotland* agrees to invoke the *nobile officium* in respect of such a course of action, such placement may be without legal authority in Scotland. Insofar as the Family Court Practice suggests otherwise at p 174, it is not correct.

80. Further and within this context, as I have also set out above, the *ratio* of *Cumbria Country Council and Ors, Re Children X, J, L and Y* is not that any orders made under the inherent jurisdiction of the English High Court authorising the deprivation of liberty of a child in a placement in Scotland not approved as secure accommodation by the Scottish Ministers *will* be recognised under the *nobile officium* jurisdiction. Rather, the ratio of the case is that where there is demonstrated a *prima facie* case that the *nobile officium* might apply to a particular type of order made under the inherent jurisdiction of the English High Court, and the balance of convenience favours an interim order pending full argument, the Court of Session is able, in an appropriate case, to grant *interim* orders under the *nobile officium*. Insofar as the Family Court Practice suggests otherwise at p 174, it is not correct.

81. Finally, and in the foregoing circumstances, *Cumbria Country Council and Ors, Re Children X, J, L and Y* is not authority for the proposition that whenever a child is placed in accommodation in Scotland pursuant to an order made under the inherent jurisdiction of the High Court an application can and must be made for a 'mirror order' to regularise the legal status of such a placement in Scotland. This *may* be the ultimate outcome of the local authority's petition to the Inner House of the Court of Session in this case. However, as matters stand, the question of whether a Scottish court will invoke the *nobile officium* in circumstances where the placement of a child in Scotland amounts to a deprivation of her liberty for the purposes of Art 5 of the ECHR, which deprivation of liberty has been authorised by an order made under the inherent jurisdiction of the High Court but where the placement is *not* a placement approved by the Scottish Ministers for the provision of secure accommodation of children for the purposes of the relevant Scottish legislation, is one that remains undecided. Insofar as the Family Court Practice suggests otherwise at p 530, again it is in error.

82. That is my judgment.