Neutral Citation Number: [2019] EWHC 1384 (Fam)

Case No: 19C01398/99

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Lancaster Castle
2 Castle Park
Lancaster, LA1 1YQ

Date: 04/06/2019

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between :

A City Council	**Applicant**
- and -	
LS	**First**
-and-	**Respondent**
RE	**Second**
-and-	**Respondent**
KS	**Third**
(A Child)	**Respondent**

- -
- -

Mr Andrew Bagchi QC (instructed by **the Local Authority Solicitor**) for the **Applicant**
Ms Meghan Gilchrist (instructed by **Paul Crowley Solicitors**) for the **First Respondent**
The Second Respondent did not appear and was not represented
M Shaun Spencer (instructed by **BDH Solicitors**) for the **Third Respondent**

Hearing dates: 23 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.

.....

THE HONOURABLE MR JUSTICE MACDONALD

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in it) to be published on condition always that the names and the addresses of the parties and the children must not be published.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

Mr Justice MacDonald:

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

2. The question arises in the context of the grave risk of harm the local authority submits pertains to the subject child in these proceedings, KS, born in 2000 and now aged 17. The risks identified by the local authority stem from KS's alleged involvement with gang activity. That involvement is said to include involvement in so called 'County Lines' drug dealing, alleged involvement in knife crime and a recent shooting, with the associated risk of reprisals, and continuing possession of or access to firearms.

3. Whilst not having available detailed statistics, this court is aware that the risk of serious or fatal harm inherent in exploitation by or involvement with Organised Crime Groups (OCGs) is a risk to which an increasing number of young people are becoming exposed. The information provided by the police in this case states that between 2017 and 2018 there has been an unprecedented increase in firearm discharges and related organised crime in the south of the city in question, resulting in deaths and gunshot injuries to gang members. The police consider that this activity places the public in considerable danger.

4. The application before the court is brought by the City Council, represented by Mr Andrew Bagchi, Queen's Counsel. The application is resisted by KS, who is separately represented by Mr Shaun Spencer of counsel, and by his mother, LS, who is represented by Ms Megan Gilchrist of counsel. KS's Children's Guardian, Catherine Mulcahy, who appears before the court today without legal representation, supports the application of the local authority.

5. In determining this application, I have had the benefit of a bundle of documents detailing the background to this matter, together with helpful Skeleton Arguments on the law from each counsel and a Position Statement from the Children's Guardian. In addition, counsel made oral submissions in support of their written arguments and the Children's Guardian briefly addressed the court. At the conclusion of this hearing I reserved my judgment. Pending my decision I declined to continue the interim orders put in place by His Honour Judge Sharpe from 26 April 2019 for the reasons given at the conclusion of the hearing.

BACKGROUND

6. The background can be shortly stated and is derived in the main from intelligence reports that have been communicated by the police to the local authority. KS lives with his mother in the south of the city. Since 2017 KS has been considered to be at risk of criminal exploitation. The police assessment is that KS is an active member of a named OCG. That OCG is believed to be involved in violent feuds grounded in attempts to take control of drug trafficking activity in identified areas of the city, further exaggerated by racial tensions. Police intelligence indicates that KS is presently in dispute with other members of the criminal community in the south of the city. The

police consider that those 'nominals' he is in dispute with have the ability to use firearms and display a willingness to conduct retaliatory attacks and to seek violent acts of retribution.

7. In August 2017, KS was found in the company of an OCG drug dealer and was deemed to be a victim of criminal exploitation. Police exercised their powers of protection pursuant to s 46 of the Children Act 1989. In September 2017 KS was said to have witnessed a gang related stabbing in the south of the city that took place that month when a young male was stabbed in the neck. Also in September 2017 KS was found to be carrying a baseball bat and a brick and was arrested for a racially aggravated assault having allegedly threatened a female with a baseball bat and thrown a brick at her. In October 2017, KS was made the subject of a child protection plan by the City Council.

8. In May 2018 KS was found in possession of a quantity of heroin and offensive weapons were found in the property in which he was arrested for conspiracy to supply Class A drugs. No charges were brought on that occasion. In July 2018 KS was arrested at a festival in possession of a quantity of cocaine on suspicion of selling drugs. Later in July police received intelligence that KS had been involved in a street altercation in which he wounded a person with a knife. In October 2018 KS was convicted of possessing an offensive weapon and assault occasioning actual bodily harm arising out of the incident in September 2017 and was made the subject of a Youth Rehabilitation Order for 18 months.

9. In late 2018 KS was attacked in the street by males wielding a machete and a knife. He was stabbed five times. He stated he did not know his attackers and would not make a complaint. A month later a male from a rival OCG suffered severe knife injuries following a window being broken at KS's home address whilst his younger siblings were present. No complaints were made by any of the parties involved.

10. In February 2019 police intelligence suggested that KS had been involved in the discharge of a firearm. In March 2019 KS was arrested following a knife attack that Police intelligence indicated was a targeted attack by members of the named OCG. A search of the family home revealed two large knives, one under KS's bed and one under the sofa. Following a strategy meeting, it was agreed that KS could return home on condition that the mother work openly with the local authority. In April 2019 KS was served with a 'Gun Crime Nominal Notice'. This is a 'disruption notice' designed to alert a person that their activities have generated Police attention and that advice and support is available should they choose. The Police identified KS as a "Gold" gun crime nominal and as being one of "top six gun crime nominals in the police force area".

11. Thereafter, KS was identified by Police as a suspect in the shooting of an adult male who had been shot in the leg in broad daylight in the presence of members of the public. KS was arrested on that date on suspicion of attempted murder and bailed. A search of his property recovered an axe. Within this context, the police considered that KS's life was under threat from reprisals following the shooting. However, KS rejected advice that he leave the area and reside in alternate accommodation, and refused to accept that he was at risk. As the result of a Strategy Meeting, the mother was advised to leave the family home with KS's two younger siblings and to stay outside the area. She has done so. A secure panel meeting concluded that the risks to KS and to other's from KS were so high as to warrant an application for an order authorising his secure accommodation.

12. Within the foregoing context, in her statement dated 15 May 2019, the social worker summarises the risks to KS arising out of the circumstances outlined above as follows:

> "The Local Authority feel that it is necessary for a continuation of deprivation of liberty in respect of KS. KS remains at risk of significant harm or harming someone else if he is to remain in the care of [the mother] and remain in [the south of the city] and immediate surrounding areas. It is known from police information that KS is in possession of a firearm and there is information to suggest that he has used this on more than one occasion. The risks to KS's personal safety have been escalating since the beginning of the year and the police have indicated that there is a significant risk to his own safety and life due to potential reprisals as a consequence of the shooting incident..."

13. The local authority issued its application on 26 April 2019 on Form C66 for an order under the inherent jurisdiction. The matter came before HHJ Sharpe late on that Friday afternoon. Whilst the Form C66 expresses the application to be "*ex parte*" and the order of 26 April 2019 states that it was made without notice, the transcript of HHJ Sharpe's judgment of that date suggests that the mother and the child were represented at the hearing. However, it has been confirmed that the mother was neither present nor represented. KS himself was not been given notice that the application was being made.

14. The local authority's application is expressed on the Form C66 to be for "Deprivation of Liberty". Elsewhere in the Form C66 the relief sought is expressed to be a "DoLs Order". The Form C66 further states that "Recovery Application also issued". There is an application form for a recovery order under s 41 of the Adoption and Children Act 2002 appended to the Form C66 but that form is incomplete and it is unclear why a recovery order under the 2002 Act was being sought in the absence of any orders having been previously made under that statute. In any event, the application for a "recovery order" ultimately appears to have been dealt with as part of the application under the inherent jurisdiction.

15. Within this context, at 5.40pm on Friday 26 April 2019, HHJ Sharpe sitting as a Judge of the High Court made the following order under the inherent jurisdiction of the court:

> "The Court declares that the Local Authority together acting in conjunction with the Chief Constable of [named area] Police and his officers may:
>
> (i) Enter any premises identified as being places where it is reasonably believed that the child may be present;
>
> (ii) Detain the child therein;
>
> (iii) Search the child for the purpose of identifying weapons in his possession and devices capable of communicating with those not in his immediate vicinity (whether by audio, video or otherwise);
>
> (iv) Remove the child from such premises;
>
> (v) Restrain the child for the purposes of transporting him to the location identified as being a place of safety;

(vi) Restrain the child during such transportation;

(vii) At the place of safety so identified restrain the child so as to enable him to be kept at such place pending further order of the court."

16. It will be seen that the order of 26 April 2019 is considerably wider than the usual terms of a deprivation of liberty order confirming that it is lawful for a local authority to deprive a child of his or her liberty in the course of an identified and named residential placement notwithstanding that that placement is not, by reason of a lack of such resources, a secure placement for the purposes of s 25 of the Children Act 1989. HHJ Sharpe himself acknowledged that the order he was making was in "expansive terms". Indeed, the order made under the inherent jurisdiction purports to delegate to the police power to enter any premises, detain and restrain KS and thereafter transport him to a placement that will deprive him of his liberty. This part of the order appears to be an attempt to replicate, under the inherent jurisdiction of the High Court, the terms of a recovery order under s 50 of the Children Act 1989. On 3 May 2019 HHJ Sharpe reviewed the case, continued the orders broadly in the terms set out above and listed the matter before me for final hearing.

17. At the time HHJ Sharpe made his order, the placement plan for KS was, pending the identification of a secure placement, to place him in a non-secure placement. KS was deprived of his liberty pursuant to the order of HHJ Sharpe on 27 April 2019 and placed at a non-secure unit. However, he absconded from the same on 1 May 2019 and has not been located to date. The local authority has now identified a secure placement, which placement is being kept open and funded pending the location and recovery of KS. I note that immediately before he absconded, KS had told the social worker that he was willing to remain in the non-secure unit and would adhere to the court order. He also told the social worker that he was not involved in the shooting in April, was not involved in gangs and did not possess a firearm nor have access to one. Prior to absconding from the non-secure unit, KS was noted to be a well mannered and pleasant young man, respectful to staff and compliant with the rules and guidance of the unit.

18. Within the foregoing context, KS has not attended this hearing. He has however written to the court and he made contact with his legal representatives shortly before this hearing commenced and was able to give them limited instructions. In his letter to the court, KS states that he considers the DOLS authorisation to be unfair, that he wishes to be back with his family, that he has "never felt like I have once been in danger" and that he wishes to commence a training course in London. Within this context, and having been able to take brief instructions by telephone, Mr Spencer summarised KS's position as follows:

i) KS resists the application of the local authority. He wishes to return home to the care of his mother.

ii) He does not accept that the police intelligence in respect of him is accurate.

iii) He understands why the court and the local authority have concerns for his welfare and for the safety of his family.

iv) He has been driven away by the fear of secure accommodation. If he knew that secure accommodation had been "taken off the table" he would co-operate with

the police and the local authority and would move away from the area with his family.

v) If secure accommodation were "taken off the table" he would even contemplate returning to the residential unit from which he absconded following the orders made on 26 April 2019.

19. KS's mother likewise opposes the application of the local authority and seeks the return home of KS. In addition to the risks said to pertain in respect of KS, the local authority asserts that KS's mother has not taken seriously the risks to her son identified by the police and has failed to engage with social services in an effort to ameliorate those risks. The local authority contends that the mother minimises KS's involvement in criminal activity. In her statement, the social worker relates that the mother stated that she does not believe KS is at risk, does not believe he is involved in criminality or associated with gangs and does not believe her or her other children to be at risk.

20. The mother contends through Ms Gilchrist that she acknowledges the need to safeguard KS and is committed to ensuring the safety of her children by continuing to adhere to the advice to live outside the area. She however is clear in her view that a DOLS authorisation will cause KS to continue to refuse to return, thereby increasing rather than decreasing the danger to him. The evidence before the court, supplemented by the helpful and concise submissions of Ms Gilchrist, articulate the mother's position on the risks to KS as follows:

i) The mother stated to the court through Ms Gilchrist that she accepts the "2017 matters";

ii) The mother accepts the matters that occurred in July 2018 involving KS save that she does *not* accept that KS was involved in a street altercation in July 2018 in which he wounded a person with a knife;

iii) The mother accepts that in November 2018 KS was attacked in the street by males wielding a machete and a knife and was stabbed five times.

iv) The mother does not accept that KS has been involved in any shooting incidents and does not believe he is at risk of reprisals.

21. The Children's Guardian, in circumstances where KS is now separately represented, supports the application advanced by the local authority. During brief oral submissions, the Children's Guardian made clear that notwithstanding the position outlined by Ms Gilchrist on behalf of the mother, that in her recent conversations with the mother, the mother had reiterated her view that the allegations were all untrue and that there was no risk to KS or herself and her other children.

SUBMISSIONS

The Local Authority

22. The local authority submits that, in circumstances where it is not open to the local authority to make an application under s 25 of the Children Act 1989, it is in KS's best

interests for orders authorising his secure accommodation to be made under the inherent jurisdiction.

23. Whilst accepting that the relief sought by the local authority "lies at the edge of the court's inherent jurisdiction" in circumstances where KS is not a looked after child, either by reason of the operation of a care order or by reason of accommodation under the statutory regime, Mr Bagchi submits that the orders he seeks do not contravene s 100(2) of the Children Act 1989 (which section prohibits the court exercising the inherent jurisdiction so as to require a child to be placed in the care, or put under the supervision, of a local authority or to require a child to be accommodated by or on behalf of a local authority) as such orders would not "require" the local authority to accommodate KS, but rather simply "authorise" such accommodation.

24. Within this context, Mr Bagchi submits that in circumstances where the statutory regime does not provide a remedy for the grave risk to KS's welfare contended for by the local authority, by reason of his not being "looked after" for the purposes of s 25 of the Children Act 1989, a statutory lacuna exists in respect of minors in KS's position who are in urgent need of the type of protection that would be available to them were they amenable to the jurisdiction conferred by s 25 of the Children Act 1989. Within this context, having regard to the terms of s 100 of the Children Act 1989, Mr Bagchi submits that the evidence before the court demonstrates that the risk of harm to KS is extremely high, that in the circumstances there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the him he is likely to suffer significant harm, and that the result which the local authority wish to achieve cannot not be achieved through the making of any order the local authority is entitled to apply for.

25. In these circumstances, Mr Bagchi submits that provided the safeguards required by Art 5 of the ECHR are adhered to, it is open to the court to make orders under the inherent jurisdiction that are required to replicate the statutory protection available under s 25 of the Act. Approaching the local authority's application by adhering as closely as possible to the prescriptions within s 25 of the 1989 Act and its subsidiary regulations, Mr Bagchi submits that on the evidence currently available to the court, the high risk circumstances that pertain with respect to KS justify the orders sought. Further, Mr Bagchi submits that given the nature of the risks identified in this case and of which the court is on notice, the positive obligation created by the Art 2 right to life requires the court to make such orders. Mr Bagchi submits that, in line with *Re T (A Child)(Secure Accommodation Order)* [2019] 1 FLR 965, KS's consent is not required to deprive him of his liberty in this manner.

KS

26. On behalf of KS, Mr Spencer submits that the starting point of any analysis must be that KS has never been made the subject of a care order and has not (save as a result of the interim order made by HHJ Sharpe on 26 April 2019) been accommodated by the local authority. Further, Mr Spencer submits that it is not now possible, by virtue of his age, for KS to be made the subject of a care order and, in circumstances where his mother, who is willing and able to provide accommodation for him, objects to him being accommodated for the purposes of s 20(7), he cannot be accommodated pursuant to s 20(3) of the Children Act 1989. In these circumstances, in common with the position of the local authority, Mr Spencer submits that it is not possible to bring KS

within the terms of s 25 of the Children Act 1989 as he is not and has at no point been "looked after" for the purposes of s 25(1).

27. Within the foregoing context, Ms Spencer further submits that it is not open to the local authority to rely on the inherent jurisdiction as the vehicle for obtaining the court's authorisation to place KS in secure accommodation. Mr Spencer argues that this can be the only proper conclusion in circumstances where (a) the use of the inherent jurisdiction in this manner is prohibited by s 100(2)(b) of the Children Act 1989 as to make the order sought by the local authority would be to require KS to be accommodated by or on behalf of the local authority and (b) the use of the inherent jurisdiction to place KS in secure accommodation would be to cut across a statutory regime that excludes children in KS's situation (i.e. children who are not "looked after") from the statutory scheme governing secure accommodation and in respect of which children there is, thus, no lacuna. Within this context, Mr Spencer argues that the instant case is plainly distinguished from those cases where s 25 of the 1989 Act is available but the inherent jurisdiction is invoked in place of s 25 due to a dearth of secure placements (see *Re T (A Child)(Secure Accommodation Order)* at [1] to [6]).

28. With respect to his submission that the use of the inherent jurisdiction in this manner is prohibited by s 100(2)(b) of the Children Act 1989, Mr Spencer submits that the order sought by the local authority authorising the deprivation of KS's liberty is, in circumstances where he is not the subject of a care order or accommodated under s 20(3) of the 1989 Act, an order that, *a priori*, requires KS to be accommodated by or on behalf of the local authority in order that the resulting placement is lawful, the local authority otherwise having no legal basis to accommodate KS against the consent of his mother, who retains exclusive parental responsibility for him. In these circumstances, where KS is not the subject of a care order and where his mother objects to his accommodation under s 20 of the 1989 Act, Mr Spencer submits that s 100(2)(b) of the Children Act 1989 operates to prohibit the court authorising the placement of KS in secure accommodating under the inherent jurisdiction. As such, Mr Spencer submits that the order sought by the local authority would plainly contravene s 100(2)(b) of the Children Act 1989, relying in support of this submissions on the decisions of the Court of Appeal in *Re E (A Child)* [2012] EWCA Civ 1773 and *Re M (Jurisdiction: Wardship)* [2016] EWCA Civ 937.

29. Mr Spencer further submits that in circumstances where the local authority now seeks to place KS in an available placement within a secure accommodation unit, rather than as previously to deprive him of his liberty in a residential unit, to make an order under the inherent jurisdiction authorising such a course would be to impermissibly cut across the legislative scheme. As I have noted, the nub of Mr Spencer's second submission is that the statutory regime excludes children in KS's situation (i.e. children who are not "looked after") from the statutory scheme governing secure accommodation, thus clearly indicating the intention of Parliament in this regard.

The Mother

30. On behalf of KS's mother, Ms Gilchrist adopted the submissions made by Mr Spencer regarding the jurisdictional framework, or rather the absence thereof, for making orders authorising the secure accommodation of KS.

The Children's Guardian

31. The Children's Guardian supports the application made by the local authority. Ms Mulcahy however made clear that this support was not based on any legal argument (in respect of which she pointed out she is not an expert) but rather on the basis of the level of risk that currently pertains with respect of KS and the need for that risk to be addressed urgently by whatever legal means are available to do so.

THE LAW

Children Act 1989 Section 25

32. The relevant provisions of s 25 of the Children Act 1989 provide as follows regarding the placement of a child in accommodation provided for the purposes of restricting that child's liberty:

> "**25 Use of accommodation for restricting liberty.**
>
> (1) Subject to the following provisions of this section, a child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in accommodation in England or Scotland provided for the purpose of restricting liberty ("secure accommodation") unless it appears—
>
> (a) that—
>
> (i) he has a history of absconding and is likely to abscond from any other description of accommodation; and
>
> (ii) if he absconds, he is likely to suffer significant harm; or
>
> (b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.
>
> (2) The Secretary of State may by regulations—
>
> (a) specify a maximum period—
>
> (i) beyond which a child may not be kept in secure accommodation in England or Scotland without the authority of the court; and
>
> (ii) for which the court may authorise a child to be kept in secure accommodation in England or Scotland;
>
> (b) empower the court from time to time to authorise a child to be kept in secure accommodation in England or Scotland for such further period as the regulations may specify; and
>
> (c) provide that applications to the court under this section shall be made only by local authorities in England or Wales.
>
> (3) It shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case.

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

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

33. Subject to an exception not applicable in this case, section 105(1) of the Children Act 1989 defines a child as "a person under the age of eighteen". The court has power to make an order under s 25 of the 1989 Act in relation to a child who is over the age of 16 (see *A Local Authority v S* [2016] 2 FLR 616) save where the child is already sixteen and accommodated under s 20(5) of that Act (see *Re G (Secure Accommodation)* [2000] 2 FLR 259).

34. Section 25(1) makes clear that s 25 applies only to a child who is being looked after by the local authority. Section 22(1) of the Children Act 1989 defines being looked after as being either "in the care of" the local authority or "provided with accommodation" by the local authority. Section 105(1) of the 1989 Act provides that any reference to a child who is "in the care of" any authority means "a child who is in their care by virtue of a care order". The court cannot make a care order in respect of a child who has reached the age of 17 years old (Children Act 1989 s 31(3)). Section 20 of the Children Act 1989 governs the provision of accommodation for children. Within the context of these proceedings, s 20(7) of the 1989 Act stipulates that a local authority may not provide accommodation under s 20 of the Act for a child if any person who has parental responsibility for that child objects.

The Inherent Jurisdiction

35. The jurisdiction of the High Court with respect to children derives from the Royal Prerogative, as *parens patriae*, to take care of those who are not able to take care of themselves (see *Re L (An Infant)* [1968] 1 All ER 20 at 24G). As I noted in *HB v A Local Authority and Anor (Wardship: Costs Funding Order)* [2017] EWHC 524 (Fam), its origins lie in the feudal period when, as an incidence of tenure, upon a tenant's death, the lord became guardian of the surviving infant heir's land and body (see Lowe, N. and White, R. *Wards of Court* 1986, 2nd edn). The inherent jurisdiction with respect to children is exercised by reference to the child's best interests, which are the court's paramount concern. Whilst under its inherent jurisdiction, the court may make any order or determine any issue in respect of a child and whilst, therefore, the jurisdiction of the court under the inherent jurisdiction is theoretically unlimited, there are, in fact, far-reaching limitations on the exercise of the jurisdiction (see *Re X (A Minor)(Wardship: Restriction on Publication)* [1975] All ER 697 at 706G). The boundaries of the inherent jurisdiction, whilst malleable and moveable in response to changing societal values, are not unconstrained.

36. Prior to the implementation of the Children Act 1989, the most frequent example of the exercise by the High Court of its inherent jurisdiction over children was in wardship. However, wardship is only one manifestation of the inherent jurisdiction with respect to children. Subject to the distinguishing characteristics of wardship being that custody of the child is vested in the court and that, although day to day control is vested in the individual or local authority, no important step can be taken in the child's life without

the court's consent, the jurisdiction in wardship and the inherent jurisdiction of the High Court are the same (see *Re Z (a minor)(freedom of publication)* [1997] Fam 1). In the circumstances, the inherent jurisdiction in respect of children can be invoked without the use of wardship (see *Re W (A Minor)(Medical Treatment: Court's Jurisdiction)* [1993] Fam 64). This is sometimes known, for convenience, as the 'residual' inherent jurisdiction of the High Court.

37. Section 100 of the Children Act 1989 imposes specific prohibitions on the use of the inherent jurisdiction where the applicant for relief under the inherent jurisdiction is a local authority. Section 100 of the Act provides as follows:

> "**100 Restrictions on use of wardship jurisdiction.**
>
> (1) Section 7 of the Family Law Reform Act 1969 (which gives the High Court power to place a ward of court in the care, or under the supervision, of a local authority) shall cease to have effect.
>
> (2) No court shall exercise the High Court's inherent jurisdiction with respect to children—
>
> (a) so as to require a child to be placed in the care, or put under the supervision, of a local authority;
>
> (b) so as to require a child to be accommodated by or on behalf of a local authority;
>
> (c) so as to make a child who is the subject of a care order a ward of court; or
>
> (d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.
>
> (3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.
>
> (4) The court may only grant leave if it is satisfied that—
>
> (a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and
>
> (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.
>
> (5) This subsection applies to any order—
>
> (a) made otherwise than in the exercise of the court's inherent jurisdiction; and
>
> (b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted)."

38. Thus, there is a strict statutory prohibition on the court exercising the inherent jurisdiction so as to require a child to be placed in the care, or put under the supervision,

of a local authority or to require a child to be accommodated by or on behalf of a local authority.

39. The Court of Appeal has made clear that the prohibitions contained in s 100(2) of the Children Act 1989 apply in the context of both the 'residual' inherent jurisdiction and in wardship. Whilst in *Re F (Mental Health Act: Guardianship)* [2000] 1 FCR 11 at 13 the Court of Appeal did not appear to consider that an application by a local authority to ward a child who would thereafter be accommodated by that local authority for her protection would contravene the terms of s 100(2) of the Children Act 1989, the Court of Appeal did not in that case make specific reference to s 100(2)(b) of the 1989 Act. Further, later Court of Appeal authority is unambiguous on the point. In *Re E (A Child)* [2012] EWCA Civ 1773 Thorpe LJ held at [16] that:

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

In *Re M (Jurisdiction: Wardship)* [2016] EWCA Civ 937 McFarlane LJ (as he then was) stated at [39] that:

> "Having been taken to the case law relied on by Mr McCarthy, I am clear that those cases do not support the proposition that the court, exercising its inherent jurisdiction, can grant authority to the local authority to provide care for a child where the local authority would not otherwise have power to do so under the statutory scheme. The most the court may do, and in some cases this may be of real benefit, is to support arrangements that are otherwise legitimately in place by making orders which are not excluded from the court's jurisdiction by s 100."

40. Within the foregoing context, there are a number of examples of the inherent jurisdiction being used in the context of the provision of accommodation provided for the purpose of restricting liberty (see for example *A Metropolitan Borough Council v DB* [1997] 1 FLR 767, *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, *Re B (Secure Accommodation: Inherent Jurisdiction)(No 1)* [2013] EWHC 4654 (Fam), *A Local Authority v S* [2016] 2 FLR 616 and, most recently, *Re T (A Child)(Secure Accommodation Order)*). In *Re A (Wardship: 17 Year Old: Section 20 Accommodation)* [2018] EWHC 1121 (Fam) the court, through wardship, used the inherent jurisdiction to authorise the placement of a 17 year old boy in secure accommodation in circumstances where he was involved in gang related activity and drug dealing.

41. However, within the context of the clear requirements of s 100(2) of the 1989 Act, it is important to note that (save for *Re B (Secure Accommodation: Inherent Jurisdiction)(No 1)* which I will come to separately below) in each of these cases

concerning authorisation under the inherent jurisdiction of accommodation provided for the purpose of restricting liberty the orders did *not* have the effect of requiring the child to be placed in the care of a local authority (the child in *A Metropolitan Borough Council v DB* being the subject of a deemed care order and the child in *Re T* already being in the care of the local authority by virtue of a final care order) or of requiring a child to be accommodated by or on behalf of a local authority (the child in *Re C (Detention: Medical Treatment)* being already accommodated for the purposes of the Children (Secure Accommodation) Regulations 1991 and the child in *A Local Authority v S* being already accommodated pursuant to s 20 of the Children Act 1989). In *Re A (Wardship: 17-Year-Old: Section 20 Accommodation)* the child had been the subject of an interim care order and, at the time of the final hearing, was being accommodated pursuant to s 20 of the 1989 Act.

42. It is the case that in *Re B (Secure Accommodation: Inherent Jurisdiction)(No 1)* an order was made under the inherent jurisdiction authorising the detention in secure accommodation of a child who was not the subject of a care order and who was not accommodated by the local authority. However, I accept Mr Spencer's submission that there are a number of reasons to treat this decision with considerable caution. First, the requirements of s 100(2) do not appear to have been the subject of detailed argument before the court. Second, whilst the court appears to have entertained doubts about whether the child could be said to be accommodated at [9] to [14], and to have perceived the significance of an answer in the negative, no final conclusion appears to have been reached by the court on that issue. Third, and importantly, before coming to its decision the court does not appear to have been referred to the decision of the Court of Appeal in *Re E (A Child)*. Within this context, I am satisfied that there are reasons to doubt that *Re B (Secure Accommodation: Inherent Jurisdiction)(No 1)* was correctly decided.

43. Finally with respect to factors impacting on the exercise of the inherent jurisdiction in the context of this case, s 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. Section 6(3)(a) stipulates that the term 'public authority' includes a court. In circumstances where the court, as a public authority for the purposes of the Human Rights Act 1998, must not act in a manner that is incompatible with Convention rights the court has a duty to comply with the Convention when applying the common law and in granting remedies (see for example *Douglas v Hello! Ltd* [2001] QB 967 at [166], *Venables v News Group Newspapers* [2001] Fam 430 at [27] and *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 at [27]). This is the position even where the common law is certain (see *Derbyshire County Council v Times Newspapers Ltd* [1992] 770 at 812 and 830). Within this context, in determining the application of the local authority for orders under the inherent jurisdiction, the court must act in a manner that is consistent with the parties rights under the ECHR. In this case, the primary rights engaged are the Art 2 right to life, the Art 5 right to liberty and security and the Art 8 right to respect for private and family life.

44. The position under Arts 5 and 8 is well established and need not be considered in detail here. With respect to the Art 2 right to life, as pointed out by both Mr Bagchi and Mr Spencer, it has long been established that Art 2 imposes a positive obligation on the State to protect the right to life. This positive obligation is engaged where the State knows or ought to know that there is a real and immediate risk to life. In such circumstances, the State must take measures within the scope of its power which,

judged reasonably, might be expected to avoid the risk to life (see *Osman v United Kingdom* [1999] 1 FLR 193 and *Van Colle v Chief Constable of Hertfordshire Police* [2009] 1 AC 225). The positive duty also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself (see *Mikayil Mammadov v Azerbaijan* (2010) Application No 4762/05). Art 6(1) of the United Nations Convention on the Rights of the Child enshrines the child's right to life and also embodies a positive obligation to protect the right to life. The UN Committee on the Rights of the Child has made clear that that positive obligation "includes protection from violence and exploitation, to the maximum extent possible, which would jeopardise a child's right to life, survival and development" (Committee on the Rights of the Child, General Comment No 6 CRC/GC/2005/6 p 9, para 2).

DISCUSSION

45. Having considered carefully the evidence and submissions in this case, and accepting that the evidence presently before the court justifies the concerns of the professionals in this case who are endeavouring to keep KS safe, I am satisfied that this court is *not* permitted to use its inherent jurisdiction to authorise KS's the placement in secure accommodation in the manner requested by the local authority. My reasons for so deciding are as follows.

46. There is no care order in force in respect of KS and an application for such an order cannot be made by virtue of his age (Children Act 1989 s 31(7)). KS has not been accommodated by the local authority for the purposes of the Children Act 1989 (whilst the order of HHJ Sharpe did result, briefly, in KS's placement at the non-secure unit, in light of the conclusions set out in this judgment, that order was not capable of causing KS to be "accommodated" by the local authority for the purposes of the Children Act 1989). KS's mother retains exclusive parental responsibility for him. She did not and does not consent to his accommodation and, accordingly, KS cannot be accommodated by the local authority for the purposes of the 1989 Act (Children Act 1989 s 20(7)). In the circumstances, KS is a child who is neither "in the care of" the local authority or "provided with accommodation" by the local authority. I am satisfied that this position has two key consequences.

47. First, KS is not a "looked after" child for the purposes of s 25 of the Children Act 1989 and does not therefore fall within the terms of that section. In the circumstances, this is not a case where a declaration under the inherent jurisdiction is sought by the local authority in order to render lawful a non-secure placement for a looked after child that amounts to a deprivation of liberty due to a lack of suitable secure beds preventing an application under s 25 of the Children Act 1989. Rather, in this case, the local authority seeks an order under the inherent jurisdiction because s 25 of the Children Act 1989 *cannot* apply to KS.

48. Second, and within this context, in circumstances where KS is not and (in circumstances where his mother objects to his accommodation and where KS cannot be made the subject of a care order by reason of his age) cannot be a looked after child, the order the local authority seeks under the inherent jurisdiction is one which would not only authorise the accommodation of KS in a secure placement, but would, *a priori*, have the effect of authorising his removal from his mother's care without her consent for this purpose in circumstances where his mother, who retains exclusive parental

responsibility for him, objects to this course of action. In the circumstances, I am satisfied that the effect of the order sought by the local authority under the inherent jurisdiction would be to require KS to be removed from his mother's care and be accommodated by the local authority. This course of action is prohibited by s 100(2)(b) of the Children Act 1989.

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

50. I am, of course, acutely conscious of the nature and extent of the risks to KS identified in the evidence before the court and of the duty of this court to act in a manner that is compatible with KS's rights under Art 2, which duty includes a positive obligation on the court to protect the right to life. However, the authorities that articulate this positive obligation make clear that it is to be discharged by the relevant public authority through taking "measures within the scope of its power" (see *Osman v United Kingdom*). For the reasons I have given, the orders sought by the local authority lie outside the scope of the court's power under the inherent jurisdiction.

51. Given my conclusions with respect to the determinative effect in this case of s 100(2)(b) of the 1989 Act, I do not consider it necessary to address the arguments advanced by Mr Bagchi regarding the existence of a statutory lacuna in respect of children in KS's position and Mr Spencer's competing submission that the use of the inherent jurisdiction to place KS in secure accommodation would be to cut across a statutory regime that excludes children in KS's situation from the statutory scheme.

CONCLUSION

52. As Mr Spencer points out in his careful and comprehensive Skeleton Argument, any reader of the local authority documentation in this case would be struck by the immense seriousness of this case, involving as it does references to attempted murder, criminal gangs, firearms and 'County lines' drug dealing. Whilst this court has made no findings in respect of these matters, on its face it is a situation that embodies the seemingly increasing tragedy of vulnerable young people for whom involvement in Organised Criminal Groups is perceived as a means of protection, of belonging, of mattering to an apparently indifferent world and who, in consequence, grasp for these things on a path that ultimately offers nothing but futility, pain and sometimes even death. As I noted at the conclusion of the hearing, in these circumstances the local authority cannot be criticised for seeking to explore the outer boundaries of the court's jurisdiction in an effort to protect KS from the risks it has identified.

53. Within this context, it may also be considered by some to be surprising that the High Court cannot simply invoke its inherent jurisdiction in the manner requested by the

local authority to address KS's situation. However, as Hayden J observed in *London Borough of Redbridge v SA* [2015] 3 WLR 1617 at [36]:

> "The High Court's inherent powers are limited both by the constitutional role of the court and by its institutional capacity. The principle of separation of powers confers the remit of economic and social policy on the legislature and on the executive, not on the judiciary. It follows that the inherent jurisdiction cannot be regarded as a lawless void permitting judges to do whatever we consider to be right for children or the vulnerable, be that in a particular case or more generally (as contended for here) towards unspecified categories of children or vulnerable adults."

54. Finally, KS has emphasised through Mr Spencer that he considers that he has been driven away and into hiding by the fear of secure accommodation. He further indicated through Mr Spencer that if he knew that secure accommodation had been "taken off the table" he would co-operate with the police and the local authority and would move away with his family from the area in which he is at risk. Indeed, if secure accommodation was "taken off the table", KS went so far as to indicate that he would contemplate a voluntary return to the residential unit from which he absconded in May of this year. KS should now be informed that the risk of secure accommodation has been "taken off the table" by operation of law. It is my hope that, in these circumstances, KS proves to be a person who honours his word and that, in consequence, he will now re-engage with those professionals who, with his best interests at heart, are working so hard to keep him safe and to help him on to a more meaningful and fulfilling path through life.

55. For the reasons I have set out above, the application of the local authority is dismissed. For the avoidance of doubt, the interim orders made by HHJ Sharpe stand discharged. There will be no order for costs save for an order that the costs of the publicly funded parties shall be assessed. I will invite counsel to draw an order accordingly.

56. That is my judgment.