Neutral Citation Number: [2020] EWHC 3383 (Fam)

Case No: FD20P00542

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Sitting Remotely

Date: 14/12/2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

The Mayor and Burgesses of the London Borough of Lambeth	**Applicant**
- and -	
L (A Child by His Children's Guardian)	**Respondent**

- -
- -

Ms Jayne Fenn (inhouse advocate for **London Borough of Lambeth**) for the **Applicant**
Mr Alan Inglis (instructed by **Covent Garden Law**) for the **Respondent**

Hearing dates: 16 October 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 14 December 2020.

Mr Justice MacDonald:

INTRODUCTION

1. In this case I am concerned with the welfare of L, a boy, born in 2006, now aged 13 years old. L is represented through his Children's Guardian, Ms Kathy Deutz. Mr Alan Inglis of counsel appears on behalf of L.

2. The court is concerned with an application by the London Borough of Lambeth for an order under the inherent jurisdiction of the High Court authorising the deprivation of L's liberty in a placement in Scotland. Ms Jayne Fenn, inhouse advocate, appears on behalf of the local authority. These proceedings were issued on 28 August 2020.

3. On 3 September 2020 the court made an order authorising the deprivation of L's liberty at a placement in Scotland on the basis that it was satisfied that L's circumstances in that placement amounted to a deprivation of L's liberty and it was in L's best interest for an order to be made. The Children's Guardian did not seek to oppose the making of a deprivation of liberty order in circumstances where L has reached a level of settlement and routine in his current placement and that the placement is meeting his current needs. L has informed the Children's Guardian that he is happy to remain in the placement until he is 15 years old.

4. Following the making of an order authorising the deprivation of L's liberty at a placement in Scotland, the local authority has instructed solicitors in Scotland to petition the Inner House of the Court of Session in Scotland for an order under the *nobile officium* to find and declare that the measures ordered by the English High Court in respect of L, should be recognised and enforceable in Scotland. The outcome of those proceedings is awaited.

5. Regrettably, the court has in these proceedings also been required to address a significant failure on the part of the local authority with respect to L. Namely, whilst the application for an order authorising the deprivation of L's liberty in his best interests was first made on 28 August 2020 and an order authorising the deprivation of L's liberty was first made on 3 September 2020, L had in fact been deprived of his liberty by the local authority *without* authorisation of the court for an extended period of time before the application for authority was issued. On 3 September 2020 I directed a statement from the Director of Children's Services for Lambeth, Alex Kubeyinje in order to explain the circumstances that had led to L's unlawful placement. That statement is now before the court.

6. It is accepted by the local authority that those placements that amounted to a deprivation of L's liberty prior to 3 September 2020 were unlawful. Within this context, Ms Fenn has indicated on behalf of the local authority that it also accepts that those placements were in breach of L's rights under Art 5 of the ECHR. The court has been made aware that a claim for damages for this breach of his fundamental rights will be issued on behalf of L in due course.

7. To its credit, in light of the highly concerning situation summarised above and considered in more detail below, and at the invitation of the court, the London Borough of Lambeth undertook at a previous hearing to carry out a comprehensive audit of its placement agreements and behaviour plans for every child looked after by the local

authority to ensure that there are no other placements which constitute an unlawful deprivation of a child's liberty and to involve the local authority's Independent Review Officers in that process. The local authority also undertook to implement additional training provision to address the deficiencies identified in this case. The training was due to be completed in November 2020 and the placement audit is due to be completed by 12 February 2021.

BACKGROUND

8. On 1 November 2016 L was made the subject of a care order at conclusion of care proceedings under Part IV of the Children Act 1989 that were issued on 4 August 2016. L is an only child who lost his Mother in 2016. When he was just 9 years old his mother was found dead in the home from pneumonia. L's Father does not share parental responsibility for L, not being named on L's birth certificate. Following the enquiries made during the care proceedings, it became apparent that L's father had had nothing to do with the family since L was 2 years old and, indeed, that the father and his family refuted paternity and wished no further involvement with L.

9. L was diagnosed during the care proceedings with an Autistic Spectrum Disorder and significant difficulties with learning and language. L is on medication and is prescribed Risperidone. On 21 January 2020 L was also diagnosed with Post Traumatic Stress Disorder. It is evident from the expert reports, and from L's behaviour historically, that he has difficulty regulating his emotions. L can get angry and frustrated, which in turn leads him into serious aggressive behaviours, both toward people and property.

10. Following the making of the care order, by which order the local authority now holds sole parental responsibility for him, L had a number of foster placements break down consequent upon his behaviour before he was finally moved to a residential placement in January 2019.

11. As I have noted, the local authority accepts that prior to 3 September 2020 L was deprived on his liberty without authorisation of the court. Whilst the precise circumstances of the illegality that attended L's placement(s) will be a matter for detailed consideration in the context of the proposed claim for damages under the Human Rights Act 1998, it would appear that from at least January 2019 L was subjected to regimes in a number of residential placements that may have amounted to a deprivation of his liberty, including high levels of supervision and the use of physical restraint. Thus, in Ms Fenn's Position Statement dated 2 September 2020, it is made clear that in his placement in January 2019 L was subject to 2:1 supervision and that in a subsequent residential unit this was increased to 3:1 supervision in November 2019. Further, and within this context, I note the following extract from the report of the Children's Guardian, who was appointed on 5 September 2020 consequent upon the local authority issuing proceedings:

> "3.10... As stated previously, while it is my opinion that the levels of L's anger and aggressive behaviour mean that the use of reasonable physical restraint is at times justified in order to safeguard him and others, I am very concerned that this has happened, without first being subject to appropriate consideration by the court.

> 3.11 I am also concerned that the incident reports received suggest that L reported receiving an injury to his finger from a physical restraint which occurred in [X] House in March 2019 and in November 2019, a report from [Y] House suggested that L had a "bleeding lip" after an incident in the car on the way to school. Confirmation is required from the local authority that L received medical attention as a result of these injuries and that they were reported to the LADO for further investigation."

12. As I have noted, L was moved to his current placement on 28 January 2020, with 2:1 supervision being introduced at that placement on 5 March 2020. Once again, whilst no application was made prior to 28 January 2020 for an order authorising the deprivation of L's liberty, it is apparent that the regime in his current placement has amounted to a deprivation of L's liberty and that, without authorisation by the court, this was unlawful. Furthermore, the placement was outside the jurisdiction.

13. As noted above, in light of the matters I have related, on 3 September 2020 I directed a statement from the Director of Children's Services for the London Borough of Lambeth, Alex Kubeyinje, in order to explain the circumstances that had led to L's unlawful placement. The statement of Mr Kubeyinje contains the following concessions:

    i) Prior to 3 September 2020 L was unlawfully deprived on his liberty (whilst Mr Kubeyinje states that this unlawful deprivation commenced on 28 January 2020, having regard to the matters I have summarised above, it would appear that the illegal deprivation of L's liberty by the local authority may well have commenced as early as January 2019).

    ii) The fact that L's current placement commenced as an emergency placement did not absolve the local authority from making an application to the court for the appropriate order or orders.

    iii) No early legal advice was sought by the local authority before the decision was made to place L in his current placement.

    iv) At the time L was placed in his current placement there was no assessment undertaken by the local authority as to whether L's liberty was or would be deprived at that placement.

    v) There was a highly regrettable delay in seeking the authority of the court to deprive L of his liberty.

14. Mr Kubeyinje goes on to make clear in his statement that the following steps have now been taken by the local authority with a view to avoiding in the future the mistakes made with respect to L's case:

    i) A practice wide alert has been issued with respect to placements outside the jurisdiction and the need to follow appropriate procedures with respect to such placements.

ii) Arrangements have been made for training to take place for social workers, staff in the placement service, early help practitioners and business support and youth offending staff.

iii) The Weekly Bulletin will place an emphasis on the law concerning deprivation of liberty in order to ensure that all staff are aware of the need to consider whether a child is being deprived of their liberty and to ensure that this does not happen save in accordance with an appropriate court order.

iv) Training will occur to ensure that staff are aware of the checks that must take place before a placement that will deprive a child of his or her liberty can occur, including training on issues of deprivation of liberty arising in respect of children placed in residential homes and in residential schools.

v) A review meeting will take place between the local authority legal department and the placement team to learn lessons from the mistakes that were made in this case.

vi) The local authority Quality Assurance Team and the Children with Disability Team will review all children open to the latter team to ensure no child is at present deprived of his or her liberty without authorisation of the court, with this review extending thereafter to all children looked after by Lambeth Children's Services.

LAW

15. As should be well known to all local authorities, 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]). These are not merely fine words. To deny a child of his or her liberty otherwise than in accordance with the rule of law is the gravest of interferences in the fundamental rights of that child, which rights are guaranteed by both the European Convention on Human Rights and the UN Convention on the Rights of the Child.

16. Article 5 of the European Convention on Human Rights provides as follows with respect to a person's right to liberty and security of the 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."

17. As I have noted in other cases of this nature, it is now 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 *In Re D (A Child)* [2019] 1 WLR 5403). 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."

18. As Baroness Hale stated in *In Re D (A Child)* [2019] 1 WLR 5403 at [31] with respect to the effect of Art 5 of the ECHR on a child who is in the care of the local authority:

> "[31] Prima facie, therefore, article 5 protects children who lack the capacity to make decisions for themselves from being arbitrarily deprived of their liberty. All parties to this case agree that this means that a local authority which has parental responsibility for a child cannot deprive the child of his liberty without the authority of a court."

19. Within this context, in *Re A-F (Children)* [2018] EWHC 138 (Fam) Sir James Munby gave extensive guidance on the proper procedure where the question of restricting a child's liberty was at issue. I make no apologies for repeating the relevant parts of Sir James' judgment in their entirety

> "[46] I have referred already (paragraph 27(iv) above) to the relevant authorities; see also the *Re X cases (In re X and others (Court of Protection: Deprivation of Liberty) (Nos 1 and 2) Practice Note* [2014] EWCOP 25, [2014] EWCOP 37, [2015] 1 WLR 2454, [2014] COPLR 674, on appeal *In re X and others (Court of Protection: Deprivation of Liberty) (Nos 1 and 2)* [2015] EWCA Civ 599, [2016] 1 WLR 227, [2015] COPLR 582). There is no need for me to embark upon either elaborate citation or exegesis, for on most points there was little difference at the Bar and the answers are in any event reasonably clear.
>
> [47] *General:* A "confinement" of the kind I am here concerned with will be lawful if, as a matter of substance it is both necessary and proportionate, i.e., the least restrictive regime which is compatible with the child's welfare and, as a matter of *process*, has been authorised by a judge in the Family Division in accordance with the procedures identified in the authorities I have referred to in paragraph 46 above.
>
> [48] *Need to apply to the court:* An application to the court should be made where the circumstances in which the child is, or will be, living constitute, at least *arguably* (taking a realistic rather than a fanciful view), a deprivation of liberty.
>
> [49] *What has to be approved:* There is no need for the court to make an order specifically authorising each element of the circumstances constituting the "confinement". It is sufficient if the order (i) authorises the child's deprivation of liberty at placement X, as described (generally) in some document to which the order is cross-referenced, and if appropriate (ii) authorises (without the need to be more specific) medication and the use of restraint.
>
> [50] *Process:* The key elements of an Article 5 compliant process can be summarised as follows:
>
> > i) If a substantive order (interim or final) is to be made authorising a deprivation of liberty, there must be an oral hearing in the Family Division (though this can be before a section 9 judge). A substantive order must not be made on paper, but directions can, in an appropriate case, be given on paper without an oral hearing.
> >
> > ii) The child must be a party to the proceedings and have a guardian (if at all possible the children's guardian who is acting or who acted for the child in the care proceedings) who will no doubt wish to see the child in placement unless there is a very good child welfare reason to the contrary or that has already taken place. The child, if of an age to express wishes and feelings, should be permitted to do so to the judge *in person* if that is what the child wants.

iii) A 'bulk application' (see the *Re X cases*) is not lawful, though in appropriate circumstances where there is significant evidential overlap there is no reason why a number of separate cases should not be heard together or in sequence on the same day before one judge.

[51] *Evidence*: The evidence in support of the substantive application (interim or final) should address the following matters and include:

i) The nature of the regime in which it is proposed to place the child, identifying and describing, in particular, those features which it is said do or may involve "confinement". Identification of the salient features will suffice; minute detail is not required.

ii) The child's circumstances, identifying and describing, in particular, those aspects of the child's situation which it is said require that the child be placed as proposed and be subjected to the proposed regime and, where possible, the future prognosis.

iii) Why it is said that the proposed placement and regime are necessary and proportionate in meeting the child's welfare needs and that no less restrictive regime will do.

iv) The views of the child, the child's parents and the Independent Reviewing Officer, the most recent care plan, the minutes of the most recent LAC or other statutory review and any recent reports in relation to the child's physical and/or mental health (typically the most recent documents will suffice).

[52] Whether and to what extent new evidence (e.g. up-to-date reports) will need to be obtained, or whether reliance on existing evidence will suffice, must depend upon (a) the extent to which the existing evidence covers the various matters referred to above, (b) the age of the existing evidence (how up-to-date is it?) and (c) the extent to which there have been any significant changes since the existing evidence was prepared. The evidence from the guardian, which I envisage can often be quite short, will typically focus on the "confinement" and "deprivation of liberty" issues; unless there has been a very significant change in the child's circumstances, the application under the inherent jurisdiction should not be an occasion for re-opening the wider welfare issues previously determined in the care proceedings.

[53] The question has been raised whether a child's competency to consent to a "confinement" can properly and fairly be assessed by a local authority social worker. Whilst I would not wish to exclude evidence on the point from a social worker who feels properly qualified to express an opinion, it is plainly undesirable that the only evidence on the point should come from an employee of the local authority responsible for the "confinement". And one would, in any event, expect that if a child whose circumstances require a regime more restricted than that of a comparator contemporary is nonetheless said to have the capacity to give a valid consent, that proposition would normally be made good by evidence from either a child and adolescent

psychologist or, depending upon the nature of the child's difficulties, a child and adolescent psychiatrist. I recognise that in putting it this way I am departing somewhat from what Keehan J said in *A Local Authority v D, E and C* [2016] EWHC 3473 (Fam)**,** para 44.

[54] *Interface with care proceedings*:

i) If, when care proceedings are issued, there is a real likelihood that authorisation for a deprivation of liberty may be required, the proceedings should be issued in the usual way in the Family Court (not the High Court) but be allocated, if at all possible, to a Circuit Judge who is also a section 9 judge. Ms Heaton and Ms Burnell suggest that thought should be given to amending the C110A form to enable the issue to be highlighted. I agree.

ii) Where care proceedings have been allocated for case management and/or final hearing to a judge who is not a section 9 judge, but it has become apparent that there is a real likelihood that authorisation for a deprivation of liberty may be required, steps should be taken if at all possible, and without delaying the hearing of the care proceedings, to reallocate the care proceedings, or at least the final hearing of the care proceedings, to a Circuit Judge who is also a section 9 judge.

iii) The care proceedings will remain in the Family Court and must *not* be transferred to the High Court (note that a District Judge or Circuit Judge has no power to transfer a care case to the High Court: see FPR 29.17(3) and (4) and PD29C). The section 9 Circuit Judge conducting the two sets of proceedings – the care proceedings in the Family Court and the inherent jurisdiction proceedings in the High Court – can do so sitting simultaneously in both courts.

iv) If this is not possible, steps should be taken to arrange a separate hearing in front of a section 9 judge as soon as possible (if at all possible, within days at most) after the final hearing of the care proceedings. Typically, there will be no need for the judge to revisit matters already determined by the care judge, unless there are grounds for thinking that circumstances have changed; indeed, the care judge should, wherever possible and appropriate, address as many of these issues as possible in the care proceedings judgment.

v) The evidence should include, in addition to all the other evidence required in the care proceedings, evidence on the matters referred to in paragraph 51 above. These matters should also, mutatis mutandis, be included in the section 31A care plan put before the court in the care proceedings.

vi) Where the care proceedings have been concluded for some time, the process will be that indicated in paragraphs 50-51 above.

> [55] *Review*: Continuing review is crucial to the continued lawfulness of any "confinement". What is required are:
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> i) Regular reviews by the local authority as part of its normal processes in respect of any child in care.
>
> ii) A review by a judge at least once every 12 months. The matter must be brought back before the judge without waiting for the next 12-monthly review if there has been any significant change (whether deterioration or improvement) in the child's condition or if it is proposed to move the child to a different placement.
>
> iii) The child must be a party to the review and have a guardian (if at all possible, the guardian who has previously acted for the child).
>
> iv) If there has been no significant change of circumstances since the previous hearing / review, the review can take place on the papers, though the judge can of course direct an oral hearing. The form of the next review is a matter on which the judge can give appropriate directions at the conclusion of the previous hearing."

DISCUSSION

20. I have recently had cause to set out, in *Lancashire v G (Unavailability of Secure Accommodation)* [2020] EWHC 2828 (Fam) at [29] to [34], the reasons why the High Court is required, at present, to consider the use of deprivation of liberty orders made under the inherent jurisdiction of the High Court to authorise the deprivation of children's liberty in regulated and unregulated non-secure placements. It is not necessary to repeat those observations here.

21. The clear corollary of that current, very difficult position however, is that it is *vital* that all local authorities adhere *strictly* to the proper legal procedures where a child is to be deprived of his or her liberty in a placement. Those proper procedures are summarised comprehensively in the foregoing paragraphs taken from *Re A-F (Children)* [2018] EWHC 138 (Fam) and *must* be followed by local authorities assiduously.

22. In this case, the London Borough of Lambeth concedes, because it must, that it failed entirely to take the steps required of it in accordance with the foregoing authorities to ensure that the deprivation of L's liberty at his current placement (and possibly at some or all of his prior residential placements) was lawful. As a result, Lambeth concedes, as again it must, that a vulnerable young man with complex and acute needs was illegally deprived of his liberty for an extended period of time. Within this context, and as I have noted, Ms Fenn informs this court that Lambeth further conceded that it has breached L's right to liberty and security of the person under Art 5 of the ECHR. Beyond this central failure, a number of additional areas of concern also emerge from the statement of the social worker and that of Mr Kubeyinje.

23. The initial statement of the social worker dated 28 August 2020 contends that the failure to apply for an order authorising the deprivation of L's liberty was:

> "...due to many reasons including L's placement being an emergency placement after his prior placement gave immediate notice that the placement had broken down and also, the current public health crisis".

Within this context, I make clear that *none* of those matters constitutes a valid reason for failing to follow the process set out in *Re A-F (Children)* for obtaining an order authorising the deprivation of a child's liberty in an appropriate case.

24. I also note that in his statement setting out the reasons for the local authority's default in this case, Mr Kubeyinje makes reference to the primary aim of the local authority being to protect L:

> "It is with regret that at the time that L was placed at [named placement], there was no assessment as to whether L's liberty was or would be deprived at that placement. The Local Authority's focus was on protecting L and identifying an appropriate placement for him."

However, as Lord Kerr pointed out in *Cheshire West and Chester v P* [2014] AC 896 at [82] "Benevolence underpinning a regime which restricts liberty is irrelevant to an assessment of whether it in fact amounts to deprivation". This observation applies equally with respect to children.

25. It is further concerning in this case that, having regard to the contents of the statement from Mr Kubeyinje, even when OFSTED Scotland raised, on 21 May 2020, the need to have an order in place with respect to L in circumstances where he was placed in the jurisdiction of Scotland, and though the placement re-iterated this to Lambeth on 9 June 2020, it still took Lambeth until 28 August 2020 to get round to issuing an application requesting authorisation for L's deprivation of liberty.

26. Finally, as I have noted above, some of the material before the court suggests that from at least January 2019 L was subjected to regimes in a number of residential placements that may have amounted to a deprivation of his liberty, including high levels of supervision and the use of physical restraint. If this turns out to be the case, it is concerning that none of the placements providing care for L appear to have queried whether there was an order in force authorising the deprivation of L's liberty or advised the local authority that the regime under which L was being cared for required such an order to be sought. Again, I say no more at this stage regarding the position that pertained before 28 January 2020 in circumstances where the precise circumstances of the illegality that attended L's placements will be a matter for detailed consideration in the context of the proposed claim for damages under the Human Rights Act 1998 that is to be made on behalf of L.

27. Turning to the merits of the application before the court, in determining whether L is deprived of his liberty in his current placement for the purposes of Art 5 of the ECHR and, if so, whether it is in his best interests to make an order authorising the same, I have applied the principles that I summarised in *Salford CC v M (Deprivation of Liberty in Scotland)* [2019] EWHC 15010 (Fam) at [35] to [41]. It is not necessary to repeat that detailed exegesis here.

28. In *Cheshire West and Chester v P* 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. L is subject to the following regime in his current placement:

i) L is subject to supervision on a 2:1 staff ratio at all times when in the community;

ii) L is subject to supervision on a 2:1 staff ratio whenever travelling by car;

iii) L is not permitted to leave the placement alone;

iv) Within the placement and the garden, L is constantly observed, from a distance, with dialogue intervention progressing to physical restraint intervention, should he seek to leave, and his behaviours escalate, warranting such intervention;

v) The CALM (Crisis Aggression Limitation Management) restraint methods, involving a 5 level system of physical intervention, is used at the times when L needs to be restrained for either his, other residents' or staff members, physical safety

29. Within the foregoing context, and applying the legal principles set out above, I am satisfied that L is unable to consent to the deprivation of his liberty and that the arrangements in his current placement in Scotland mean that he is subject to continuous supervision and control and is not free to leave the placement, such that those arrangements constitute a deprivation of L's liberty for the purposes of Art 5 of the ECHR.

30. With respect to his best interests, as I have acknowledged above, L has reached a level of settlement and routine in his current placement with a consistency of care that is, albeit with a high staff ratio, clearly of benefit to him. Having considered the current provision for L, the Children's Guardian is satisfied that the placement is meeting his welfare needs and recommends that he remain in that placement. For his part, L has made clear to the Children's Guardian that he is currently happy to remain in the placement. Within this context, I am satisfied that the current placement can provide for L's physical, emotional and educational needs, keep him and others safe, promote and facilitate his development and provide him with a stable and nurturing home environment, albeit within a residential setting. Within this context, I am further satisfied that it is in L's best interests to authorise the deprivation of his liberty at his current placement under the inherent jurisdiction. Such an order represents, in my judgment, the necessary and most proportionate means of ensuring that L benefits from his current placement whilst ensuring his safety and the safety of others. I am further satisfied that this is the least interventionist approach available to the court in order to achieve these aims having regard to L's needs.

CONCLUSION

31. In the circumstances, I make an order authorising the deprivation of L's liberty in his current placement in Scotland. I will list this matter for review 2 months from the date of this hearing. I will also give permission to the Children's Guardian to disclose such papers from these proceedings as are required to secure advice with respect to a claim for damages on behalf of L under the Human Rights Act 1998.

32. As Baroness Hale observed in *Re D (A Child)* at [1], the principles set out in this judgment are not new in circumstances where "The common law has long protected the liberty of the subject, through the machinery of *habeas corpus* and the tort of false imprisonment." The inherent gravity of any violation of a child's longstanding right to liberty and security of the person makes it *essential* that the State adhere to the rule of law when seeking to deprive a child of his or her liberty (see again *Brogan v United Kingdom* (1988) 11 EHRR 117 at [58]). If the child's right to liberty and security of the person is to be properly protected this approach must be applied with *rigor* by local authorities notwithstanding the current accepted difficulties in finding appropriate placements for children with complex needs who require their liberty to be restricted. Local authorities are under a duty to consider whether children who are looked after are subject to restrictions amounting to a deprivation of liberty. A local authority will plainly leave itself open to liability in damages, in some cases considerable damages, under the Human Rights Act 1998 if it unlawfully deprives a child of his or her liberty by placing a child in a placement without, where necessary, first applying for an order authorising the deprivation of the child's liberty.

33. That is my judgment.