Neutral Citation Number: [2024] EWHC 1690 (Fam)

Case No: FD24C40148

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2024

Re J: Local Authority consent to Deprivation of Liberty

Before :

MRS JUSTICE LIEVEN

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Ms Tanya Zabihi (instructed by **Banes and North East Somerset Council**) for the **Applicant**
Ms Sophie Smith-Holland (instructed by **RWK Goodman Solicitors**) for the **First Respondent**
Ms Sorrel Dixon (instructed by **Lyons Davidson Solicitors**) for the **Second Respondent**
Ms Libby Harris (instructed by **Daniel Woodman Solicitors**) for the **Third Respondent**

Hearing dates: **1 March 2024**
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Approved Judgment

This judgment was handed down remotely at 10.30am on 25 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Lieven DBE :

1. This is an application for a Deprivation of Liberty Order ("DoLs order") in respect of J, a 14 year old boy. J is currently a looked after child under s.20 Children Act 1989 ("CA"). The application before me is for a DoLs order and a final Care Order. The matter was listed before me to consider whether a DoLs order was required on the facts of the case.

2. Banes and North East Somerset Council, the Local Authority ("LA"), were represented by Tanya Zabihi. The Mother (the First Respondent) was represented by Sophie Smith-Holland, the Father (the Second Respondent) was represented by Sorrel Dixon and the Children's Guardian was represented by Libby Harris. I am very grateful to all of them for their assistance.

3. J has a complex set of diagnoses, including autism and ADHD. J has been known to the Disabled Childrens Team of the LA for many years. His autism impacts on his communication skills and on his cognition. J does not communicate through words, and those around him have to observe and interpret his behaviour. He has an understanding of routines and recognises familiar faces and places. He is aware of where he lives and he knows when he is taken out from his home. However, it is apparent that he functions in an entirely different way from most 14 year olds.

4. J is also diagnosed with Pica. This is an eating condition by which the individual tries to swallow non-food items. This seems to particularly occur when J is unsettled or distressed. He can be impulsive about what he puts in his mouth, and has no recognition of the harm this could cause him. He has, for example, put magnets in his mouth.

5. J's conditions are life long and unlikely to change for the rest of his life.

6. J resides at a specialist Children's Home which is registered for sensory, learning and/or physical impairments. I have every reason to believe that J receives a very high quality of care.

7. J's parents struggled to provide J with the care he requires, which led them to agree to s.20 CA accommodation on 1 April 2020. The LA were concerned about them not fully engaging with the LA, the provider and J, and therefore issued care proceedings. I note that the Mother has mental health difficulties, and neither she nor the Father were able to provide J with the very high level of specialised care he needed at home, but that does not reflect any lack of love for him.

8. The LA care plan is that J will continue to live at this specialist Children's Home for the rest of his minority. He appears to be happy and settled there, apparently often smiling and seeming relaxed. The staff will work to provide a transition into adult care at the appropriate point. J will undoubtedly need care for the rest of his life.

9. Unsurprisingly, J is subject to a high level of care and supervision, including what might be described as restrictions. The windows in his room have latches that can only be opened an inch; there is total supervision in the community; if J wants to go to the garden he takes his shoes to the door, the staff support him to go out fully supervised, or direct him to another activity. He is followed to the toilet, to offer

support and to ensure he does not defecate on the floor. The property is Pica safe, with all small objects placed safely away from him. At night there are two waking staff to support J and the other two children in the property. He has to wear a harness in the car to prevent him getting into the footwell.

10. The LA seek a Care Order and a DoLs order. The Care Order is not resisted by any party. The parents accept that they cannot care for J, and that a Care Order is appropriate given the level of his needs. The Guardian supports the making of a Care Order. In those circumstances I have no hesitation in making the Care order.

11. The real issue in this case is whether it is necessary for the Court to make a Deprivation of Liberty Order.

12. There are two issues about whether a DoLs order is required here. The first is whether there is a deprivation of liberty within the meaning of Article 5 European Convention on Human Rights ("ECHR"), applying the first and third limbs of *Storck v Germany* [2006] 43 EHRR 6. The second is whether the parents and the LA can consent to the care that is being provided to J.

13. In respect of the first issue, I set out the principles that apply in *Re SM (Deprivation of Liberty; Severely Disabled Child)* [2024] EWHC 493 (Fam). SM was both physically and mentally profoundly disabled and was totally unable to either physically leave or have any wish or intention to leave. I therefore found that it could not sensibly be said that she was deprived of her liberty by any action of the State. Her inability to leave the premises was entirely a function of her own situation.

14. I accept that the position is less clear cut in respect of J. Although there is an argument, based on the analysis in *Re SM*, that he is not objectively confined by reason of the actions of the State, in the light of the caselaw, and in particular *Cheshire West v P* [2014] AC 896, I do not think it is open to a court of first instance to reach that conclusion. I therefore accept that the first and third *Storck* limbs are met.

15. The second issue is whether the parents and the LA, if a Care Order is made, can give consent to any deprivation of liberty. Ms Zabihi was entirely frank in saying that although the LA would be very pleased to be told that the LA could give consent and therefore a DoLs order was not needed, they were being careful to ensure that they were acting lawfully.

16. It is easy to understand any LA's caution in this situation, not wishing to unlawfully deprive a child of their liberty, but it does lead the Court to focus on the purpose of a DoLs order in a case such as this. In practice the real purpose of a DoLs order is to provide a defence against any future claim for unlawful detention or breach of Article 5, by making a declaration that any deprivation (within the terms of the order) would be lawful. In theory at least, a DoLs order would also provide a defence to any claim for habeas corpus. However, that exposes the oddity of requiring a DoLs order in a case such as this. There is no possible dispute that it is in J's best interests for him to be deprived of his liberty in accordance with the restrictions imposed in the order.

17. In principle if the *Storck* criteria are met then the deprivation of liberty is a breach of Article 5 and in all probability an unlawful detention at common law. However, in

reality the consequences of such a breach, in a case such as J's, are extremely limited. That is relevant because in my view it exposes why the LA in J's case can consent to the deprivation of liberty.

18. It is inconceivable that any Court would grant a writ of habeas corpus given that neither J nor anyone acting on his behalf would seek his release, because all agree it is in his best interests to remain at the Children's Home, and to be subject to the current level of care and supervision. Equally it is inconceivable that he would be awarded damages for unlawful detention or breach of Article 5, even if no DoLs order was made, for effectively the same reason. All concerned, including his State appointed Guardian (through Cafcass), have agreed that it is in his best interests to remain at the Children's Home. He has not asserted his right to liberty and neither has anyone else on his behalf, nor could they do so on the facts of the case, whether prospectively or retrospectively. It is therefore quite difficult to see what the point of a DoLs order is on the facts of a case like J's. There may be contractual and insurance reasons why LAs feel compelled to seek DoLs orders, even in cases where they appear to have no real benefit or purpose (other than the face of a legal order), but that is outside the legal requirements which the Court needs to apply.

19. The rationale for the court considering DoLs applications in circumstances such as this may be, as suggested in *Cheshire West* and subsequent cases, to ensure that safeguards are in place and there is court oversight of the process. Article 5 requires that any deprivation of liberty must be "in accordance with a procedure prescribed by law". The Supreme Court in *Re T (A Child)* [2021] UKSC 35 held that the use of the High Court's inherent jurisdiction fell within the "in accordance with law" requirement. However, the need for a legal process if there is a deprivation of liberty cannot itself be relevant to the substantive content of the right. If the LA can provide valid consent in J's case, then there is no requirement for a DoLs order, whatever the possible benefits of "safeguards" of a court process, in this case the High Court DoLs List.

20. As is explained below, the test for whether a LA can make a decision or grant consent in respect of a child in their care is whether the consequences are "of great magnitude" to the child, see *In re H* [2020] EWCA Civ 664 and *In re C Child in care; choice of forename* [2016] EWCA Civ 374). Although in principle a decision to deprive a child of their liberty is a significant interference in a fundamental right, a proposition which lies at the heart of the reasoning in *Cheshire West,* in reality for J imposing the restrictions sought is inevitable, unavoidable and overwhelmingly in his best interests.

21. Ms Zabihi submits that the LA cannot consent to J being "deprived of his liberty" by reason of the judgment of Keehan J in *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 3125, which I will describe as *Re D (No 2)*. That was one of a series of cases concerning Child D, which went to the Supreme Court in *Re D (A Child)* [2019] UKSC 42. In the Supreme Court the issue was whether parents could consent to a deprivation of liberty of their child, if s/he was 16 or 17. The Supreme Court held that they could not. I considered these judgments in *Lincolnshire CC v TGA* [2022] EWHC 2323 and held that parents could consent to the deprivation of liberty of a child under the age of 16 if the child was not *Gillick* (*Gillick v West Norfolk and Wisbech Area Health Authority* [1985] UKHL 7) competent and there was no dispute

that the deprivation was in the child's best interests, see [47]. I note that decision has not been appealed, or doubted so far as I am aware in any subsequent judgment.

22. The issue in the present case is whether a LA, which holds parental responsibility for a child under the age of 16, under a Care Order, can consent to a deprivation of liberty of that child. In *Re D (No 2)* Keehan J held that it could not so consent. He referred back to *Re D (no 1),* where he had found that the parents could consent to a deprivation of liberty. He then said at [26] that the same considerations would apply when a child is accommodated by a local authority under s.20 CA. However, he said that the parent's ability to consent would depend on the circumstances and that the local authority could not consent:

> *"27. At the other extreme, there will be cases where children have been removed from their parents' care pursuant to a s.20 agreement as a prelude to the issue of care proceedings and where the local authority contend the threshold criteria of s.31(2) of the Children Act 1989 are satisfied. In such an event, I find it difficult to conceive of a set of circumstances where it could properly be said that a parent's consent to what, otherwise, would amount to a deprivation of liberty, would fall within the zone of parental responsibility of that parent. This parent's past exercise of parental responsibility will, perforce of circumstances, have been seriously called into question and it would not be right or appropriate within the spirit of the conclusion of the Supreme Court in Cheshire West to permit such a parent to so consent.*
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> *28. Where a child or young person is in the care of a local authority and is subject to interim or care orders, the reasoning in paragraph 27 applies with even greater force, especially when one considers the effect of an interim care order, which includes the power of the local authority to restrict "the extent to which a parent may meet his parental responsibility for the child" (s.33(3)(b) Children Act 1989).*
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> *29. Where a child is in the care of a local authority and subject to an interim care, or a care, order, may the local authority in the exercise of its statutory parental responsibility (see s.33(3)(a) of the Children Act 1989) consent to what would otherwise amount to a deprivation of liberty? The answer, in my judgment, is an emphatic "no". In taking a child into care and instituting care proceedings, the local authority is acting as an organ of the state. To permit a local authority in such circumstances to consent to the deprivation of liberty of a child would (1) breach Article 5 of the Convention, which provides "no one should be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law", (2) would not afford the "proper safeguards which will secure the legal justifications for the constraints under which they are made out", and (3) would not meet the need for a periodic independent check on whether the arrangements made for them are in their best interests (per Lady Hale in Cheshire West at paragraphs 56 and 57)."*

23. The central part of Keehan J's reasoning appears to be in [29] and his concern that the local authority is an organ of the State, and thus the State is depriving the child of

their liberty. There therefore has to be a procedure prescribed by law; proper safeguards and a periodic independent check on the terms of the deprivation. However, in my view that analysis conflates two separate issues relevant to Article 5. For present purposes I accept that the first and third limbs of *Storck* are met, because the LA, or in fact its agent the care provider, does not allow him to leave the premises unaccompanied. Therefore the restrictions on J are imposed by the State. However, that does not mean that the LA, acting as the corporate parent under s.33 CA, cannot consent to that deprivation.

24. Applying the analysis in *Storck*, limb (a) is met because there is objective confinement, but that does not mean that limb (b) is necessarily met, because there may be a valid consent granted for the confinement.

25. If there is valid consent, whether from an adult with capacity or the parent of a child within the zone of parental responsibility, then there is no deprivation of liberty within Article 5. The need for a procedure prescribed by law, proper safeguards and periodic checks do not arise, because there is a valid lawful consent.

26. Therefore, in my view, the key question is the scope of the LA's power to consent to a child's deprivation of liberty. The assumption that the LA cannot consent appears to have flowed from what was said in the Supreme Court, particularly by Lady Hale in *Cheshire West* at [24] about the importance of decisions around deprivation of liberty. Lady Hale referred to the Strasbourg case of *Guzzardi v Italy* (1980) 3 EHRR 333:

> *"24. Fifthly,*
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> *"119. The court has also held that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when it is not disputed that person is legally incapable of consenting to, or disagreeing with, the proposed action."*
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> *The first reference is to De Wilde, Ooms and Versyp v Belgium (No 1) (1971) 1 EHRR 373 , paras 64-65, and the second is again to HL v United Kingdom 40 EHRR 761 , para 90 (see para 7 above)."*

27. There is no question that any deprivation of liberty is a very significant intrusion into fundamental human rights. However, as I said in *Lincolnshire County Council v TGA & Ors (Deprivation of Liberty Parental Consent)* [2022] EWHC 2323 (Fam) it is not obviously apparent why deprivation of liberty decisions should be treated differently from important medical decisions concerning children, or indeed other decisions that may have an important impact on the life of the child:

> *"53. Lady Hale distinguished Gillick at [24] in Re D on the grounds that it concerned medical treatment and not deprivation of liberty, which as a matter of fact is undoubtedly correct. However, I am not convinced that for under 16 year olds that distinction is critical to the principles that should apply in this case. In terms of the importance of the decision in question, the decision on medical treatment can be fundamental to the child's life. In the most extreme cases it can determine whether the child*

lives or dies. If a parent consents to the treatment, then in the case of a non- Gillick competent child, that can lead directly to their death or to life changing medical treatment, simply on the basis of parental consent. The decision as to medical treatment can therefore be just as important, and just as much an intrusion into the child's human rights, as any decision relating to Article 5.

54. Lady Hale said at [48] that the parent could not licence the State to intervene in the child's fundamental human rights. However, the parent can consent in medical cases to such an intervention, so long as the clinical view is the intervention is in the child's best interests. However, it is noteworthy that there is no requirement in every case, even the most serious medical treatment cases, for that decision to be approved by the Court. It is one for the parents falling within the zone of their parental responsibility, so long as the clinicians involved are satisfied it is in the child's best interests.

55. In determining whether the decision is one for the parent or the child, in medical treatment cases it is established that the Court or clinicians must consider the maturity and intelligence of the particular child. It is irrelevant whether an equivalent hypothetical child of the same age would or would not be competent to make the decision.

56. It is not clear to me why a different approach should be taken to parental decisions about deprivation of liberty. Both Lady Hale and Lady Black relied on the fact that Gillick involved contracting the boundaries of parental responsibility, whereas Re D might have been said to be extending them. However, as explained above, Hewer v Bryant establishes the extent of such powers for parents, therefore this is not a case of expanding parental rights. In any event, it is clear, as I have set out above, that any exercise of such responsibility can only be undertaken in the child's best interests.

57. More fundamentally, when dealing with children, whose ability to understand the issues will vary greatly depending not simply on their age, but on their psychological and emotional maturity, their family support and their life experiences, in my view it is more appropriate to consider the characteristics of the individual child than try to compare them with a hypothetical child of the same age. Whereas it is appropriate to assume that someone over the age of 16 will have capacity, and therefore there is a benchmark to compare the non-capacitous adult with, that is a much more difficult and arguably less possible exercise for children under 16. For that reason, I prefer the approach of Gillick to consider the characteristics of the particular child."

28. Section 33 CA sets out the scope of a LA's powers where a care order is in place:

"**33 Effect of care order.**

(1) Where a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.

(2) Where—

(a) a care order has been made with respect to a child on the application of an authorised person; but

(b) the local authority designated by the order was not informed that that person proposed to make the application, the child may be kept in the care of that person until received into the care of the authority.

(3) While a care order is in force with respect to a child, the local authority designated by the order shall—

(a) have parental responsibility for the child; and

(b) have the power (subject to the following provisions of this section) to determine the extent to which

(i) a parent, guardian or special guardian of the child; or

(ii) a person who by virtue of section 4A has parental responsibility for the child, may meet his parental responsibility for him.

(4) The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

(5) Nothing in subsection (3)(b) shall prevent [a person mentioned in that provision who has care of the child] from doing what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting his welfare.

(6) While a care order is in force with respect to a child, the local authority designated by the order shall not—

(a) cause the child to be brought up in any religious persuasion other than that in which he would have been brought up if the order had not been made; or

(b) have the right—

(i). . . . . .

(ii) to agree or refuse to agree to the making of an adoption order, or an order under section 84 of the Adoption and Children Act 2002, with respect to the child; or

(iii) to appoint a guardian for the child.

> (7) While a care order is in force with respect to a child, no person may —
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> (a) cause the child to be known by a new surname; or
>
> (b) remove him from the United Kingdom, without either the written consent of every person who has parental responsibility for the child or the leave of the court.
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> ….
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> (9) The power in subsection (3)(b) is subject (in addition to being subject to the provisions of this section) to any right, duty, power, responsibility or authority which a person mentioned in that provision has in relation to the child and his property by virtue of any other enactment."

29. In *Re H (Child)* [2020] EWCA Civ 664 the Court of Appeal considered the scope of an LA's powers in the context of an issue around a child in care being vaccinated against their parents' wishes. At [26], [27] and [30] King LJ said:

> *"26. On a strict reading of s.33(3)(b) , and subject only to the exceptions already highlighted, the extent to which a local authority may exercise its parental responsibility is unlimited, provided that it is acting in order to safeguard or promote the welfare of the child in its care.*
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> *27. However, whilst that may be the case when considering the section in isolation, local authorities and the courts have for many years been acutely aware that some decisions are of such magnitude that it would be wrong for a local authority to use its power under s.33(3)(b) to override the wishes or views of a parent. Such decisions have chiefly related to serious medical treatment, although in Re C (Children) [2016] EWCA Civ 374; [2017] Fam 137 (Re C), the issue related to a local authority's desire to override a mother's choice of forename for her children. The category of such cases is not closed, but they will chiefly concern decisions with profound or enduring consequences for the child.*
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> *…*
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> *30. In Re C therefore it was held that:*
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> *i) Certain decisions are of such magnitude that they should not be determined by a local authority without all those with parental responsibility having an opportunity to express their view to a court as part of the decision-making process;*
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> *ii) Section 100 CA 1989 is available to a local authority in serious medical treatment cases because it is not seeking to confer a power on itself; the High Court is instead being asked to use its inherent jurisdiction to limit, circumscribe or sanction the use of power which the local authority already has by virtue of section 33(3)(b) ;*

> *iii) As the section provides, leave to apply can only be granted where the court has reasonable cause to believe that, if the inherent jurisdiction was not exercised with respect to the children, they would be likely to suffer significant harm."*

30. The Court then concluded at [95]:

> *"The situation is, in my view, different in the public law sphere when a care order is in place. A care order is only made if the welfare of a child requires such an order to be made, it having been determined or conceded that pursuant to s.31(2) CA 1989 , the child has suffered or is likely to suffer significant harm attributable "to the care given to him or her not being what it would be reasonable to expect a parent to give him". In other words, the child in question has suffered (or was likely to suffer) harm as a consequence of the care given to him or her by a person with parental responsibility. It is against that backdrop that the parent of a child in care holds parental responsibility. Parliament has specifically, and necessarily, given the local authority that holds the care order, the power under s.33(3)(b) to override the views of a parent holding parental responsibility. The local authority's view prevails in respect of all matters save those found in the statutory exceptions or where, as I identified in Re C , the decision to be made is of such magnitude that it properly falls within the provisions of s.100."*

31. Although that case concerned a very different issue to the present, namely the giving of vaccinations, there is no obvious reason why the core test should not be the same. Namely, is the decision that the LA is being asked to make under s.33(3)(b) CA "of such magnitude" that it cannot be made by the LA, but rather must be made by the Court.

32. There is no doubt, as Lady Hale said, and is clear from *Guzzardi*, that the removal of an individual's liberty is a significant infringement of their human rights and an important decision. However, in this, as in every other aspect of human rights law, context is all and it is necessary to consider the facts of the individual case.

33. The approach that the LA can never exercise its powers of parental responsibility under s.33(3)(b) to grant valid consent for a deprivation of liberty rests on the proposition that a deprivation of liberty is necessarily a decision of such magnitude as to require the role of the court. Although logically that conclusion might flow from what Lady Hale said in *Cheshire West* and *Re D*, neither of those decisions concerned the scope of parental responsibility in respect of children under the age of 16, let alone the scope of s.33(3)(b) in decisions concerning children of that age and deprivation of liberty.

34. Further, if one applies the test to the facts of J's case, it is in my view clear that the decision to deprive him of his liberty is an inevitable one, which no reasonable court or parent would depart from. One way of testing this proposition is to consider what would happen if the LA, or those authorised to look after J i.e. the Children's Home, did not put in place the restrictions sought. They would very obviously be in breach of their duty of care to J, given his known vulnerabilities and the manifest risks to his safety if he was allowed to leave the home unsupervised. In reality it is the obligation

of any responsible carer of J to place restrictions upon him in order to keep him safe. Therefore, far from the restrictions amounting to a serious infringement of his rights that no LA could lawfully consent to, they are restrictions essential to ensuring his best interests, and indeed required by the State's positive obligations under Article 2 ECHR to protect his life. In those circumstances in my view they fall within the LA's statutory powers in s.33 CA.

35. Therefore the decision to "deprive him of his liberty" is not in my view a decision of such magnitude as to fall outside the LA's powers, but rather an exercise of their statutory duties to him. In my view the LA have the power to consent to the restrictions and therefore to the deprivation of his liberty, and no DoLs order is needed.