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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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M's (a minor) Application [2015] NIQB 8

IN THE MATTER OF AN APPLICATION BY M (A MINOR) ACTING BY HIS NEXT FRIEND, THE OFFICIAL SOLICITOR, FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION BY THE A HEALTH AND SOCIAL CARE TRUST DATED 25 APRIL 2014

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MAGUIRE J

Introduction

[1] In this case the applicant is a young man who I shall refer to as "M". He is now aged 15. M currently resides at X Care Home. This is a residential facility which provides specialist residential care for children aged 10-17 years who are referred by a Health and Social Services Trust to it.

[2] M arrived at X Care Home on or about 25 April 2014. He was initially placed there by reason of the Health and Social Care Trust providing him with accommodation pursuant to Article 21 of the Children (Northern Ireland) Order 1995 ("the 1995 Order"). Article 21(1) states that:

> "Every authority shall provide accommodation for any child in need within its area who appears to the authority to require accommodation as a result of ….
>
> (c) the person who had been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

[3] The judicial review application is concerned with the lawfulness of the arrangements which have been made by the Trust in respect of M's placement at X Care Home. These arrangements have arisen from the particular circumstances and background of M, to which the court now turns.

Background

[4] The relevant background is described in the affidavit of WK who is a senior social worker employed by the Trust. At paragraph 3 she notes that X Care Home consists of a number of different houses. The house in which M is placed is an 8 bed all male house. Prior to M's placement, the Trust engaged in a process of risk assessment in respect of him. This was because the Trust had concerns about M's "presenting behaviours". The object of the assessment was to compile a care plan that best met M's needs as well as addressing other safeguarding issues. WK avers (at paragraph 5 of her affidavit):

> "At all times the Trust have sought to find the least intrusive manner in which to deal with these matters."

She also (at paragraph 6) makes it clear that:

> "It is not the case that children in residential care, some of whom have extreme behavioural and/or lifestyle issues have complete freedom and autonomy to move from the house as and when they wish."

She later puts it as follows:

> "What a resident may do is 'dependant on each individual boy's care plan' for example as to whether he could leave the house without permission."

[5] In the case of M the care plan as developed derived from an assessment of him prepared for the Trust by a forensic clinical psychologist, Dr OI. This assessment is dated 2 April 2014 and was written at a time when M was on remand in custody at Woodlands Juvenile Justice Centre ("Woodlands") on charges of rape and sexual assault of his mother.

[6] Dr OI has twenty years' experience working in the criminal justice system and has been trained in the assessment and treatment of young people who have displayed or are displaying harmful sexual behaviours. For the purpose of her assessment she had access to all of the case files relating to the applicant. Dr OI notably had met with the Child Protection Officer at Y College, an educational institution, which M had been attending before his move to Woodlands and had received information from the police in respect of the charges referred to above, which M was facing. She also herself had carried out a psycho-sexual assessment of

M in spring 2013 in relation to a sexual offence, to which M pleaded guilty, which involved an 8 year old female child. The report is based on the assumption that the allegations made by M's mother may possibly have validity. As she put it:

> "It is … imperative that we cover any risks that [M] may potentially pose to others in any placement arrangements for him."

[7] Dr OI then sets out in her report a list of key facts affecting any placement decisions. The court will set these out (without correction of syntax or grammar):

> **"Key facts to be considered in any placement decisions**
>
> 1. [M] has one previous diversionary disposal for Intentional sexual touching of a child less than thirteen years". The victim was an eight year old female [relative] who woke up during the assault.
>
> 2. This offence took place in his aunt's house where he had been a regular overnight visitor for most of his life, and at a time when all members of the household were asleep.
>
> 3. [M] informed us that this offence was motivated by his watching a tv programme late at night which involved two adults engaged in a similar sexual behaviour.
>
> 4. He told us that he had chosen that particular child because he considered that
>
> a. she was a very deep sleeper and thus unlikely to wake up.
>
> b. she was too young to understand what was happening.
>
> 5. He told me during assessment that he had made a deliberate choice to penetrate her anally rather than vaginally because he believed he would be less likely to be caught as 'people do not check there'.
>
> 6. During the therapeutic intervention in relation to the offence on [an 8 year old female relative] [M]

indicated that there had been other occasions when he had intruded into this child's sleeping space, while entertaining sexual thoughts in relation to her. It is therefore also possible that this may not have been the first or the only assault on this child, but it indicates that [M] may pose a risk if allowed freedom to move around unsupervised in areas where people are sleeping. This obviously has implications for any placement where [M] could have access to other children or young people who might also be sleeping in an unsecured bedroom.

7. [M] is currently on remand on charges of rape and sexual assault of his mother and is currently denying these charges. This assault was alleged to have happened while his mother was asleep, although it is also possible that she may have been made even more vulnerable by having consumed alcohol before going to sleep. Assuming the possibility that an assault may have taken place as alleged, this again would have implications for the risk [M] might pose if he were to have access to young people, male or female, who have been incapacitated or intoxicated by the consumption of alcohol or drugs either in their place of residence or within the community.

8. 'Forensic evidence in relation to these charges would tend to add weight to the veracity of the complaint made by the defendant's mother.' …. This would indicate in the absence of clear evidence to the contrary there is a dear need to ensure that all persons in contact with [M], as a result of his release on bail from custody, will not be put in a position where they could potentially be put at risk of a sexual assault.

9. [M]'s mother had earlier concerns in relation to potential sexual deviance when she discovered, on more than one occasion, articles of her own and her daughter's underwear hidden in [M]'s bedroom. This would indicate that it is likely that these were used for masturbatory purposes, and were likely to be linked to sexual fantasies about the owner's of the underwear. It also suggests that [M]'s sexual development may already have begun to deviate

from the norm several years before his assault on [an 8 year old female relative].

10. [M]'s mother had previously informed Youth Justice worker's that [M] had entered her bedroom while she was sleeping on more than one occasion over the past year, and had taken money and car keys from her handbag, which was located close to her as she slept.

11. [M] has raised concerns in relation to a range of incidents of low level anti-social behaviour in the community, including bullying of a peer (as part of a group), criminal damage to a car, theft of his mother's car keys, taking and driving that same vehicle in a manner endangering human life, and theft of money from his mother's purse while she was sleeping. He openly admits that he enjoys breaking the rules.

12. He also has a long history of aggressive behaviours towards other young people in school, as well as persistent rule breaking and disruptive behaviour, which has led to [Y] College suspending him on a regular basis over the last year. This has culminated in a recent application by them for alternative educational provision, for him just prior to his arrest on the current charges.

13. [M] has a complex personality profile which initially presents as compliant, reasonable and motivated to change his unacceptable behaviours, while at the same time clearly evidencing, that when not under scrutiny, he has no real interest in adhering to instructions, rules or boundaries and will regularly engage in behaviours that will display a lack of respect for the rights of others.

14. [M] does not present on assessment, as a particularly callous or emotionally disturbed child, and indeed has engaged well in all work that has been done with him over the last year. However In spite of apparently "good engagement" in offence focused sexually harmful behaviour work, which also included sex education in relation to boundaries, respect for others and clear rules around issues of consent, we now have a concern that [M]'s interest in

illegal sexual behaviour may have continued unabated, regardless of this input.

15. This raises the possibility that [M]'s psycho sexual problems may be much more serious than it would originally have appeared, and has highlighted the need for a much more intensive intervention with a focus on his relationship with his mother. This is likely to require further assessment of [M]'s attachment history, relationship with his mother and the strong possibility of early childhood trauma.

16. [M] has a supportive extended family who have demonstrated their love and concern for [M] throughout our involvement with him. His grandmother and maternal aunt have been regular visitors to Woodlands during his time here and these visits seem to be very important to him.

17. [M] has been very insistent since his admission to custody to have telephone contact with his younger sister, and in my opinion this is contra-indicated as, given what we have recently learnt about risk management in the family home, we would now have concerns that she may have been put at risk from him, in spite of efforts to prevent this. It is likely that [M] will continue to attempt to make contact with her regardless of his placement, if given any opportunity to do so, and he is likely to be very resourceful to this end. Obviously possession of a mobile phone increases this risk. I believe contact with her brother at this time would not be in this child's interest, although I understand that her mother has given instructions that this is not to happen in any case.

18. It would appear that [M] has a very complex relationship with his mother who also has her own difficulties in relation to mental health issues and alcohol misuse. It may also be significant that she has called for social services to remove [M] from her care several times over the past year due to increasing levels of defiance and aggression displayed towards her in the home.

19. Up until now we have been advising his mother to continue to care for him at home as we

realised that given the fact that [M] has a tendency to gravitate towards other young people with similar attitudes to authority, a care setting was likely to set him on a trajectory to further anti-social behaviour, which would undermine our efforts to divert him away from such activities.

20. [M] has recently shared with us that he has already begun to experiment with cannabis and alcohol in the company of other young people in his local community, and associates with others who are on the fringes of criminal activity and drug dealing. Obviously if [M] were to get access to either alcohol or drugs, his risk is likely to increase, as we know that under the influence of intoxicating substances, inhibitions are lowered, impulsivity increases and decision making is compromised.

21. [M] has expressed an intermittent interest in having contact with his estranged birth father, who he has had no contact with since early childhood. I understand that this man is listed as a schedule one offender who also has a substantial criminal record for offences involving violence. It would be important that [M] does not make contact with this man, as, even if her were interested in his son (which is unlikely), he would be a very unhelpful role model for [M] at this time.

22. As [M] has expressed a strong attachment to his maternal grandparents and their extended family it would be important that any placement decision takes this into account as [M] is very young and has indicated his need to continue to have regular contact with them by way of visits and phone calls to help him cope with the stresses of his current situation.

23. [M] has demonstrated in Woodlands that he is not a particularly confident child when interacting with his peers, but that he will work very hard to gain acceptance, and yet still would be the weakest member of the group. It is possible that low self-esteem and possible bullying/rejection by peers may have played its part in his pathway into harmful sexual behaviour.

24. This lack of social confidence may fuel a need to have power over other people, possibly through abusive sexual behaviours, as evidenced in his behaviour towards [an 8 year old female relative] when he was just 12 years old. This may have implications for the type of child [M] might choose as a potential victim. If he were to reoffend in the future, i.e. he is most likely to target a child who is vulnerable by virtue of younger age, socially rejected, isolated, lacking in confidence, or intellectually challenged.

25. In relation to his current mental health status, [M] has presented in Woodlands as a resilient child and is currently not exhibiting any behaviour indicative of emotional distress. He has adjusted well to the secure environment here and does not pose any particular difficulties in relation to his behaviour here, other than those mentioned below.

26. During his stay in Woodlands [M] has had to be challenged on several occasions re inappropriate behaviours with a sexual connotation."

[8] By way of summary, Dr IO acknowledged that in the area of adolescent sexual offending, risk assessment is an inexact science. A balance was needed, in her view, between the need to protect others from sexual assaults and the young person's needs to be permitted access to as normal a life as possible to enable the promotion of healthy, personal, social and emotional development. Dr IO went on to set out the persons who she thought were at risk from M as follows (without correction of syntax or grammar):

Persons deemed to be at risk from [M] and why:

- Young females - since [M]'s original offence was for a serious sexual assault on an 8 year old child.

- Young males (potentially) - due to his admission to me that he attempted anal penetration of the same child, supporting my concern that we could not rule out the possibility of a similar assault on a male victim.

- Very young children — since his original victim was pre-pubescent and his reason for choosing her on that occasion, over a range of

possibilities, was that "she would be too young to understand what was happening." This has implications if [M] were to befriend another young person who had younger siblings, that he might get access to or get to know, if he had the freedom to leave care in the company of other residents who were visiting their family home.

- Peer age young people — particularly in the context of a social/romantic relationship with them, where they were not aware of his interest in sexually assaultive behaviour, and therefore, could unknowingly put themselves in a vulnerable position, where [M] may engage in social or pre-sexual behaviours, with a view to progressing towards assault, should the opportunity present itself. Obviously this risk is higher should the other young person be incapacitated by substance misuse or have a prior history of sexual victimisation.

- Possibly adult females — since his current charges relate to the same age group and again involve allegations of a non-consensual penetrative assault.

- Possibly members of the public — probably female. Up to now we have no evidence that [M] has committed any sexual offences in the community or in his interactions with peers, but given the extreme nature of the current charges, it would be prudent to assume, that, until we have more information about this child's sexual interests, that he is potentially a risk to any vulnerable person he may come in contact with, particularly if they are not aware of his potential for sexual assault behaviours. Potential victims could be of any age ranging from young children to adults, particularly those who appear vulnerable by virtue of age, incapacity, drug or alcohol use, or indeed who find themselves alone, in an isolated area, where he has an opportunity, to engage with them unobserved.

- Possibly female staff members - in any facility where they are left in a position where they could find themselves alone in [M]'s company, and where he assesses the risk of being disturbed or reported as low."

[9] In Dr IO's view, M would be best accommodated in a secure childcare setting. She stated:

> "Such a secure environment should minimise his risk to others, both children and adults, and also should restrict his access to the community at large, to cover the possibility that he may be a risk to the public."

However, she also raised the issue of close supervision of M. She notes that M:

> "Requires close supervision at all times as he is an opportunist and is likely to be actively assessing the environment, and the people in it, for opportunity to meet his needs, regardless of the restrictions imposed on him."

In these circumstances it was Dr IO's view that "line of sight supervision" should take place in respect of M. Dr IO also suggested that all staff needed to be briefed about M's personality and profile. It was important, Dr IO felt, that M should have access to a secure placement in an educational setting suited to his needs. Ideally, this would incorporate:

> "Small group teaching; curriculum suitable for his age and ability level; line of sight supervision during toilet breaks, break and lunchtimes which also allows him to interact normally with his peer group; transport to and from the educational facility, it not available on site of his residential placement."

[10] Dr IO in her assessment dealt with the position if a placement in a secure setting was not available, especially if M was placed in an open residential setting. In such circumstances, she stipulated that M would require line of sight supervision at all times in communal areas. During hours of darkness a staff member was to be placed outside his room. A similar arrangement would apply if he went to his room during the day. Likewise if M was out in the community he should be accompanied by a member of staff at all times but no female member of staff should be left alone with him. Breaches of these arrangements, it was suggested, may lead to a return to court on the grounds that the placement had proved unstable.

[11] Dr IO envisaged arrangements of this nature as subsisting until the conclusion of the criminal proceedings against M. After that "alternative arrangements may need to be made to accommodate him". Interestingly, Dr IO did not support a secure placement outside Northern Ireland as she felt it would disrupt his family links here.

[12] Following Dr IO's report, once M was moved into X Care Home, M was subjected to an initial risk assessment. Much of what is in this risk assessment is similar to that found in Dr IO's assessment but the following points are worth highlighting:

- X Care Home is an open facility with a substantial female workforce.
- It also has female residents (though only one, it appears, at the date of the assessment).
- It backs onto a local primary school.
- Additional finance would be provided to bolster staff numbers in X Care Home to ensure a high level of supervision for M.
- X Care Home has its own educational and leisure resources.

[13] The initial risk assessment – which appears to be an in-house document - is thoughtful and lengthy and deals in detail with the multi-factual issues which arise in M's case. The assessment refers to two other sources to which some reference is necessary. The first relates to the bail conditions upon which M had been granted bail in respect of the charges preferred in relation to his mother. These enabled him to reside in open conditions at X Care Home, in contrast to the closed conditions of Woodlands. There were five bail conditions which ought to be noted. These were:

(a) That he must reside at his home address between 9 pm and 7 am. During these hours he was to be subject to electronic tagging.

(b) He was to report 3 times per week to police.

(c) He does not have contact with his mother.

(d) He was required to reside at an address to be provided by the Trust.

(e) He was to engage with the Youth Justice Agency and comply with all their requirements.

The above were conditions imposed by the High Court but they later also formed the basis for grants of bail in the Crown Court. There were later further admissions

to bail in respect of other charges once these had been preferred but the essential matrix remained the same.

[14] The second source is what is described in the assessment as the behavioural contract with the Trust. This seems to be based on:

(i) A letter from the Trust to the applicant's solicitors of 25 April 2014 in which the Trust offered accommodation for M at X Care Home. The letter states:

> "Our client will provide: one to one staffing by a member of [X Care Home] Staff on a 24 hour basis. For the avoidance of doubt this includes supervision both within [X Care Home] and supervision should he leave the accommodation. This supervision provision is necessary to meet the Trust's previously communicated concerns regarding risk."

(ii) Attached to the letter was a contract which M would be asked to sign. The contract attached was headed "Contract for [M's] placement in [X Care Home]".

It then contained five bullet points. These were:

- I understand the bail conditions (see attached).
- I understand all breaches will be reported to the police – zero tolerance.
- I understand and agree to the Risk Management Plan of the Trust that includes a member of residential staff to be with me at all times – line of sight supervision (one-one 24/7).
- I will attend on-site education.
- I will co-operate with recommended bail support (detail to be confirmed).

Signed …"

[15] The applicant's solicitors responded to the Trust's offer on 25 April 2014. The reply referred to an enclosed "copy accepted contract" but the letter then went on to:

> "As discussed, we take issue with the one-one supervision along the lines you propose. In our view the same constitutes a depravation [sic] of liberty contrary to our client's rights under Articles 5 and 8 of the European Convention on Human Rights … until the matter is resolved our client will co-operate

> with one-one supervision. However, the said co-operation should not be taken as his consent to measure continuing indefinitely."

[16] It appears from the above therefore that M's solicitor, on his behalf, consented to the proposed arrangement but not unconditionally and not for an indefinite period.

Care Proceedings

[17] Following the placement of M at X Care Home under Article 21 of the 1995 Order *supra*, it appears that the Trust obtained from the Family Court on 6 May 2014 an interim care order in respect of him. It is helpful to place this into context. Up until November 2013 it appears that M had been a student or a pupil at Y College. However, his position there, according at least to the Trust, had become "unsustainable" due to persistent rule breaking and disruption. On 8 November 2013 the school advised that there ought to be alternative educational provision made for him and this seems to have been the outcome of a discussion at a multi-disciplinary meeting. However, before any step in this regard was taken M was arrested by police on or about 11 December 2013 in respect of an alleged rape of his mother and was remanded in custody to Woodlands. He appears to have remained at Woodlands until his move to X Care Home in late April 2014. It is unclear from the above what the precise reasons were for the Trust making an application for a care order but it is clear that the making of an interim care order was not a contested step. One expects therefore that when the interim care order was made all concerned were satisfied that the test found at Article 50(2) and Article 57 of the 1995 Order had been met. The interim care order which was obtained has been renewed periodically and is currently in position.

The Supervision Regime in Practice

[18] As noted above, the supervision regime in respect of M while he is placed at X Care Home has been operating since his arrival there at the end of April 2014. The evidence placed before the court contains information (in the form mainly of logs of incidents and other records) which provides at least a limited picture of how the regime works in practice. It is not possible to set out all of the information here but the court, in particular, notes the following:

(i) There was a Looked after Children meeting shortly after M arrived at X Care Home on 15 May 2014. It referred to M having "settled into the routine" and as having complied with "contract and bail conditions in place". It refers to these being a weekly risk strategy meeting being held to review risk assessment. The record goes on to refer to M starting to form relationships with staff and other young people within the Unit.

(ii) At a later stage there is reference to M "struggling with restrictions in place" and with the lack of contact from his extended family. The placement overall was described as "stable". The senior practitioner is noted as reporting to the meeting that M was supervised at all times. The Unit manager referred to instances where the applicant had tested the boundaries, for example, in relation to the geographical coverage of the electronic tag he was subject to for bail purposes. On one occasion it was reported that M had been observed "with his hands lingering near the behind of one of the female classroom assistants". This was addressed with him. As regards contact, the report of the meeting noted that M was in contact with his maternal grandmother and a maternal aunt. At one point M asked about the possibility of him going out to see people. He was advised to discuss this with the senior practitioner. There is a record of the decisions made at the meeting which included that M should remain at X Care Home and that he should adhere to the conditions of the contract, including that of 24 hour supervision. Contact issues were to be explored.

[19] A further document before the court relates to what was described as a risk strategy minute of a meeting at X Care Home on 22 May 2014. By that stage, there is reference to M attending school for the majority of the day and to him complying with bail conditions. Under the heading "Trust Conditions" there is reference to M telephoning his aunt and maternal grandmother. It is noted that "all calls are supervised". Other issues of contact were explored. There is included in the papers a number of what are described as "untoward incident reports". On 12 June 2014 one of these notes said that M posted a letter to his sister at a local shop without permission as there had been a ban on him having indirect contact with her. There was a query about whether this was a breach of bail but the police did not pursue this. The matter was discussed at a Risk Strategy Meeting on 20 June 2014. There was an incident on 20 June 2014 to which reference was made. This related to M going out of his way to ask a female staff member to open his bedroom. To do this he had bypassed three male staff and had gone into a staff room where the female staff member was alone. He then closed the door. Nothing further seems to have occurred in respect of this incident. Among the decisions taken at the meeting was one which indicated that a holiday for M had been cancelled because of the letter incident which was described as a breach of trust.

[20] There was an incident on 23 June 2014 which resulted in the applicant being charged with criminal damage to the custody desk at Bangor police station. This occurred when he was being interviewed by police about an alleged assault on his sister S. M ran out of the interview room and attacked the perspex front of the custody desk. On this occasion, the police bailed him to return to the station later.

[21] On 7 July 2014 there is a record that M and two other young males left the Unit to go outside to a local shop. Two members of staff left with them following behind. At one point M and the two others jumped into the bushes and went out of the sight of the officers. It is not clear whether or not the applicant made his own

way back to the Unit but it is clear that enquiries were made with police as to whether there had been a breach of bail. When M was spoken to about the matter by X Care Home staff his response was that the staff members were "up his ass". No action *vis a vis* the alleged breach of bail resulted from this incident.

[22] The papers contain an extensive "behaviour log" in respect of M which runs from 19 June 2014 to 7 July 2014. This contains a series of incidents in which M was thought to be getting close to female staff members. In addition, there were instances of what might be described as M testing the boundaries.

[23] There was a meeting of what was described as the Resource Panel on 9 July 2014. It was recommended that if there were "any further breaches" of monitoring/supervision in placement this may result in the need to return to the restriction of liberty panel despite the previous ruling concerning this *viz* not to use a secure accommodation order because of the possible effect on vulnerable females in the placement. On consideration, the Resource Panel felt that the current placement was the most suitable option at present.

Educational Supervision

[24] An affidavit has been filed in these proceedings by LO, on behalf of the Trust relating to the above subject. Mr LO is a principal social worker and he indicates that M's educational needs are being met at X Care Home. At paragraph 4 he refers to M attending a dedicated school at X Care Home. This is exclusively for the use of residents and each resident attending it has a Personal Education Plan. Under the arrangements M has a minimum of four one to one tutorials a day spanning such core subjects as English, Mathematics, Science and ICT. He also, Mr LO avers, is able to engage in PE and in a Metalwork Workshop. Mr LO is of the view that M is more than capable of achieving GCSE standards in his core subjects. The latest reports on him, he notes, show that M attendance is nearly 100% and that his tutors are very positive about his engagement within class.

The Applicant's Case

[25] Mr Ronan Lavery QC and Mr Corkey BL represented the applicant in these proceedings. In short form, the applicant's case, they argued, could be encapsulated in the following propositions:

(i) The regime under which he is held amounts to a deprivation of his liberty. This is because he is the subject to of one-one supervision and is unable to leave the placement without a supervisor.

(ii) Any deprivation of liberty must be justifiable for the purpose of Article 5 of the European Convention on Human Rights. This means:

(a) That it must come within one or other of the exceptional cases found in Article 5; and

(b) That it must be in accordance with a procedure prescribed by law.

(iii) This case does not fall within any of the exceptional cases in Article 5.

(iv) In any event, the deprivation of M's liberty has not been affected by a procedure required by law.

The respondent's case

[26] Mrs Keegan QC and Ms Martina Connelly BL represented the respondent. In short form, the respondent's riposte to the applicant's case could be encapsulated as follows:

(i) The regime under which M lives does not amount to a deprivation of liberty. Properly analysed, the placement does no more than restrict movement in a proportionate way which falls outside Article 5.

(ii) If Article 5, contrary to the last submission, is engaged in this case, there has been no breach of it.

(iii) The case comes within one of the exceptions to the general right to liberty in Article 5(1) which provides for detention of a minor for the purpose of educational supervision.

Article 5

[27] Article 5, in its material part reads:

> "(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 the 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 an 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 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 and detention of a person to prevent his effecting an unauthorised entry into the country or a person against whom action is being taken with a view to deportation or extradition."

[28] It is well established and was not in dispute between the parties that Article 5(1)(a)-(f) provides an exhaustive definition of the circumstances in which a person may be lawfully deprived of his liberty. For an authority to this effect: see Engel v The Netherlands (No. 1) (1976) 1 EHRR 647 at paragraph 57.

[29] It was also not in dispute that any deprivation of liberty must be in accordance with a procedure prescribed by law. Prescription by law may arise from the common law: see, for example, Steele v United Kingdom (1998) 28 EHRR 603 at paragraph 54.

[30] Moreover it was common case that to engage Article 5 there must be a "deprivation of liberty" and restrictions on freedom of movement do not concern Article 5. In determining whether the level of restraint involved amounts to a deprivation regard, everyone agreed, should be had to "a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question", a phrase which recurs in the case law.

[31] The court must, in short, look at the concrete situation of the individual concerned. Article 5 will not apply where the individual consents to the restriction provided the consent is clearly established and is unequivocal.

Case-law

[32] Both parties brought to the court's attention a range of cases drawn from the Strasbourg and municipal courts. However none of the cases deal precisely with the

sort of problem confronting the respondent in this case, where the authority is dealing with an individual of full capacity who nonetheless is young and requires a form of care which is protective both to him and to others who might be affected by his actions. The authorities, nonetheless, are of considerable assistance in their exposition of the general principles which underpin this area of law and it will be for this purpose that the court will refer to them. However, while it has considered all of the authorities cited to it, the court will be sparing in its references to the case law as there is a high degree of repetition in it and, as already noted, there is a substantial level of agreement between the parties as to the approach the court should adopt.

[33] The leading Strasbourg authority appears to be Stanev v Bulgaria (2012) 55 EHRR 22. This is a decision of the Grand Chamber and involved an applicant who had capacity to make his own decisions but who had been diagnosed with schizophrenia. His affairs were within the control of a guardian who arranged for him to live in a social care home for adults with a mental disorder. He was not informed of the arrangement in advance. Once at the home he was subject to a regime in which he required the permission of the director of the care home if he wanted to leave. In fact on occasions he was allowed to leave for short periods but as his financial resources and identity papers were managed by the home he inevitably returned to it. He alleged that the extent of the controls on his movements amounted to a deprivation of liberty for the purposes of Article 5. The Strasburg Court upheld his claim and found that there had been a breach of Article 5. He had capacity, the court held, to make decisions and the decision to place him in the home was contrary to domestic law. But, in addition, the regime into which he was placed constituted a deprivation of liberty which could not be justified under Article 5.

[34] Paragraph 115 of the judgment of the court dealt with the general principles which fell to be applied in the context of Article 5(1) of the Convention. It stated:

> "The court reiterates that the difference between deprivation of liberty and restrictions on liberty of movement, the latter being governed by Art 2 of Protocol No 4, is merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the court cannot avoid making the selection upon which the applicability or inapplicability of Art 5 depends. In order to determine whether someone has been deprived of his liberty, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measures in question."

[35] While paragraph 116 of the judgment refers to the particular context of deprivation of liberty on mental health grounds (which does not arise in the present case) it is nonetheless of interest to note that it says that:

> "A person could be regarded as having been 'detained' even during a period when he was in an open hospital ward with regular unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital".

[36] When applying the relevant principles to the facts of the case, the Stanev court went on to observe (at paragraph 124) that "while it is true that the applicant was able to go to the nearest village, he needed express permission to do so. Moreover the time he spent away from the home and the places where he could go were always subject to controls and restrictions". This led to the conclusion (at paragraph 128) that "although the applicant was able to undertake certain journeys, the factors outlined above lead to court to consider that … he was under constant supervision and was not free to leave the home, without permission, whenever he wished". At paragraph 129, the court noted that the duration of the measure was not specified and was thus indefinite. In view of the above and other factors the court concluded that the situation under examination amounted to a deprivation of liberty within the meaning of Article 5(1).

[37] The leading case in municipal law is a recent decision of the Supreme Court in Surrey County Council v P and Others; Chesire West and Chester Council v P and Another [2014] AC 896 (hereinafter "Chesire West"). There were in all three persons whose rights where being considered by the court. All suffered from a lack of capacity to make decisions about their case. The focus of the court related to the regimes in operation in each case for care and to the question of whether it amounted to a deprivation of liberty for the purpose of Article 5. In each case the court held that there had been a deprivation of liberty.

[38] The leading judgment was that of Baroness Hale. At paragraph [19] *et seq* she discusses the question: what is a deprivation of liberty? To answer that she referred *inter alia* to Stanev *supra* (citing the passages above) and traced the Strasbourg jurisprudence back to Guzzardi v Italy (1980) 3 EHRR 333.

[39] At paragraph [46] an important general statement is made by Baroness Hale. She says:

> "… as it seems to me, what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and

> control, only allowed out with close supervision, and unable to move away without permission even if such opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable and indeed make my life as enjoyable as it could possibly be, should make no difference."

[40] The acid test which Baroness Hale favoured was one which turned on whether the person at issue could be said to be under constant supervision and control and was not free to leave: see paragraph [49]. This approach was shared by Lord Neuberger at paragraph [63].

[41] A case, cited for a specific purpose which is worthy of mention in connection with the interpretation of paragraph (d) of Article 5(1), is In Re K (Secure Accommodation Order: Right to Liberty) [2001] 2 WLR 1141. In this case the Court of Appeal in England and Wales had to consider whether a secure accommodation order granted in relation to a child and which had the effect of depriving the child of liberty was lawful and in conformity with Article 5 of the Convention. In particular an issue arose as to whether such an order came within one of the exceptions contained at paragraphs (a)-(f) of Article 5(1). It was held that the order was in conformity with the Convention as it came within the wide language of Article 5(1)(d) as being detention of a minor by lawful order for the purpose of educational supervision. At paragraphs [34]-[39] Dame Elizabeth Butler Sloss P discussed the issue at some length but regarded it as clear that a deprivation of liberty which nonetheless involved the child receiving carefully supervised education did not breach Article 5 because it came within paragraph (d). Thorpe LJ came to the same conclusion at paragraph [62] citing the decision of the European Court of Human Rights in Koniarska v United Kingdom (Application No. 33670/96) to the effect that:

> "[i]n the context of the detention of minors, the words 'educational supervision' must not be equated rigidly with notions of classroom teaching. In particular, in the present context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned."

Judge LJ also agreed: see paragraphs [105]-[106]. At paragraph [108], in a passage which has a resonance for the facts of this case, he stated that:

> "Therefore the restriction in Article 5(1)(d) is specifically directed to the situation of those minors who are beyond such normal control. Prosecution and punishment do not invariably present the most

> efficacious solution to the behavioural problems of children and young persons, and their long term development, whether viewed entirely as a matter of their own self-interest or the general benefit of the community as a whole. There is much to be gained if the underlying causes of the misbehaviour of a child or young person can be examined and addressed. Hence the need to allow restrictions on the liberty of minors with such problems, which goes beyond normal parental control and allows for the educational supervision."

[42] Finally, the court's attention was drawn to the Strasbourg Court's recent decision in Austin v United Kingdom (2012) 55 EHRR 14. The application related to a challenge on Article 5 grounds to the practice of the Metropolitan Police of "kettling" protestors and others as a public order tactic in the context of controlling public demonstrations. It was alleged that this tactic as used on a particular occasion in central London amounted to a deprivation of liberty which was unauthorised in Convention terms. In Austin the court indicated that in reaching its conclusions it could take into account the type and manner of implementation of the measure in question and the fact that the implementation of restrictions on freedom of movement or liberty were in the interests of the common good. It noted that it did not consider that:

> "Commonly occurring restrictions on movement, so long as they are rendered unavoidable as a result of circumstances beyond the control of the authorities and are necessary to avert a real risk of serious injury or damage, and are kept to a minimum required for that purpose can properly be described as 'deprivations of liberty'." (paragraph 58)

However, it should not be overlooked that Austin was viewed by the court itself as "based on the specific and exceptional facts of this case" (see paragraph 68).

Application of the principles to the facts of this case

Deprivation of Liberty

[43] There can be little argument that the supervision arrangements put into operation in this case are wide ranging. In effect, M has to endure line of sight supervision by a member of the staff at all times except when he is in his own bedroom. Even when he is in his bedroom there is a member of staff placed outside it. As it was succinctly put in one of the Trust's documents, the regime under which he was to live involves "1:1 supervision 24-7". Moreover the regime is not time

limited, though it was to be the subject of review and, as the court understands it, is being reviewed currently.

[44] The issue of whether M is free to leave the placement has been controversial as between parties. On the one side it may be said that M is under pressure to comply with the rules which have been devised for him and has nowhere else in practical terms to go to, save perhaps for secure accommodation, while on the other side it may be said he is not confronted by locked door or high fences or walls and in this sense is free to leave X Care Home if he wishes. The options open to the Trust if M fails to comply with what the regime requires appear to the court to be limited if it is assumed the Trust remain committed to the need, identified by Dr IO and others, to give a high value to the interests of safeguarding those who might be at risk from him. The Trust, especially given its human rights obligations to others and its responsibilities to M under the interim care order, cannot simply abandon M. M, moreover, has no obvious alternative place to which he could go outside the current placement, save perhaps for secure accommodation. In these circumstances M's freedom, such as it is, is probably more apparent than real.

[45] In the court's view, it is necessary to assess M's current regime realistically, having regard to the realities of where he finds himself. The test, it seems to the court, is that found in Stanev and in Chesire West, which on their facts are much closer to this case, rather than that found in Austin, a case very much associated with its own context and factual matrix.

[46] In argument the suggestion was made that this may be a case not inconsistent with Article 5(1) in that it involves an exercise of parental responsibility by the Trust in respect of a child in care and therefore is no different in principle from the curtailment of liberty of a child which is a normal incident of family life, which would not ordinarily constitute a breach of the Convention. The court is unable to accept the validity of this argument. No doubt there are occasions when a parent does limit a child's liberty in a variety of contexts. Acts of parental discipline of a child may have this effect. Moreover, those who act *in loco parentis* may also take steps to control and supervise a child, for example, where a child is on a school trip or a child boards at a boarding school. But it seems to the court that there is a clear distinction which needs to be made between everyday actions of this sort and the regime in existence in the present case, which has been tailored to deal with the particular behavioural problems of this applicant and which involves him being shadowed in his everyday activities and only being able to do things when he is given permission to do them, which in practice will mean being able to do what he wishes to do only when there is an available member of the X Care Home staff available to keep an eye on him. Such a regime is altogether of a different nature and degree, in the court's view, than that which is part and parcel of the normal diet of daily parental control.

[47] It has also been suggested that the regime represents no more than the performance by the Trust in respect of the applicant of its statutory duties to

promote the welfare of a child in its care. That the Trust has such duties has not been the subject of contention in the course of the hearing, but it seems to the court, this does not provide an answer to the applicant's case which turns on the absence of legal authorisation for a supervision system which may entail the deprivation by the Trust of the applicant's liberty.

[48] When the Stanev and West Chesire standards are applied in this case, the court is clear that the current regime to which M is subject, while not involving physical barriers and the like, nonetheless does entail a deprivation of liberty and is not just one involving restrictions on movement falling short of this.

Is the deprivation of liberty authorised for the purpose of Article 5(1)?

[49] The court has no difficulty in answering the above question in the negative in this case. There has been no suggestion that the loss of liberty on the part of M has been the subject of authorisation, prospectively or retrospectively, in accordance with a procedure prescribed by law. While in argument the possibility that bail conditions set by the court could constitute authorisation in certain circumstances was debated, Mrs Keegan, for the Trust, in the court's view correctly on the facts of this case, did not pursue this. It seems to the court that what the Convention will usually require in a case like this where a regime of deprivation of liberty is proposed for a child in care, is authorisation, at least ultimately, by a court but that this had not been sought in this case – no doubt, because the Trust did not perceive itself as depriving M of his liberty. If, by reason of an emergency or other unforeseeable circumstance, there is any delay in obtaining authorisation, it should be sought as soon as practicable.

[50] The court, however, is satisfied that arrangements such as those operating in this case and which involve a deprivation of liberty in respect of a child in care could be authorised by a court in a proper case.

[51] On the facts of the present case, as exposed to the court on the evidence before it, in principle, the arrangements could be justified under paragraph (d) of Article 5(1). That this may be so is demonstrated by the affidavit filed on behalf of the Respondent by LO which contains averments which would be likely to bring the case comfortably within paragraph (d), as that paragraph has been interpreted in In Re K *supra.*

Remedy

[52] The court will hear argument from the parties as to what is the appropriate remedy in this case, given the court's conclusions, bearing in mind that the Family Court should in the context of on-going care proceedings be able to hear an application by a Trust for the court's authorisation of an arrangement such as that put into effect in this case. The initiative in this regard must rest with the Trust and

the applicant should, save for an application made in an emergency, be able to defend such an application if he/she wishes to. The court would have to decide whether any proposed arrangement amounts to a deprivation of liberty and, if it does, determine whether it should be authorised by the court. In order for it to be authorised the court would inevitably have to ensure that it does not breach Article 5. But where the proposal is justified and proportionate for the purpose of Article 5 and is made consistently with the scheme of that Article, there ought to be no barrier, in principle, to the court giving the necessary green light to it. The Family Court should also in the circumstances where a deprivation of liberty has been authorised be alert to the need to review any such authorisation at periodical intervals and be available to deal with any later application by the party in care to seek to have the authorisation removed or varied.