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Salford CC v M (Deprivation of Liberty in Scotland) (2019)

[2019] EWHC 1510 (Fam)

17/06/2019

Barristers
John Tughan KC

Court
Lancaster County Court

Practice Areas
Public Children Law
The case concerned a child, M who was aged 13, and whether she was deprived of her liberty in her current placement in Scotland, and how this was to be lawfully approved.

The background to the mater was set out by Mr Justice MacDonald [§9-19]. The mother and her four children (M, L, N and H) moved to England from Easter Europe in 2012/2013. Salford City Council became involved in 2013, with all the children being subject to Child Protection Plans for various periods. M presented with significant challenging behaviours including aggression and sexualised behaviour, would regularly go missing from home and school and was considered a victim of child sexual exploitation.

Care proceedings were issued after the mother felt unable to parent M, and M was subject to an interim care order and was placed in a residential children's home. Whilst there she continued to abscond, was exploited by older men, including drugs, alcohol and sexual activity. M was moved from this to a placement in Scotland, in circumstances where no suitable placements were identified in England, on 8 September 2018.

At a hearing on 4 October 2018 HHJ Butler gave the local authority permission to invoke the inherent jurisdiction and made an interim declaration authorising the deprivation of M's liberty at her placement [§16]. The local authority failed to bring to the attention of the court until 23 April 2019 legal advice it had received on 8 November 2018 from Scottish solicitors to the effect that there is no method by which a child's liberty can be lawfully deprived in the jurisdiction of Scotland in a placement that is not approved by the Scottish Ministers [§17].

The questions before Mr Justice MacDonald were thus threefold [§6]:

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

ii) If so, should the court permit an adjournment to enable the local authority to petition the Inner House

of the Court of Session in Scotland for orders under the nobile officium "to find and declare that the measures ordered by the High Court in respect of [M] should be recognised and enforceable in Scotland as if they had been made by the Court of Session" (see Cumbria Country Council and Ors, Re Children X, J, L and Y at [35])?

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

Mr Justice MacDonald undertook a review of the evidence presented by an expert in Scottish law, Mr Inglis [§20-23]. Broadly, Mr Inglis' evidence was that a petition to the Inner House of the Court of Sessions was very unlikely to succeed. The submissions by the parties [24-30] largely focused on this being an unduly pessimistic attitude. Mr Justice MacDonald then summarised the applicable law on deprivation of liberty and cross border secure placements in Scotland [§32-53].

Mr Justice MacDonald found that that the regime that pertains in M's placement did act to deprive her of her liberty for the purposes of Art 5 of the ECHR, that the application to adjourn these proceedings should be allowed to permit the local authority to petition the Inner House of the Court of Session in Scotland for an order finding and declaring that the measures ordered by the High Court in respect of M should be recognised and enforceable in Scotland as if they had been made by the Court of Session and that, in the circumstances and the interim declaration authorising the deprivation of M's liberty should be continued pending the determination of petition in Scotland [§54].

On deprivation of liberty he stated that M's movement were significantly restricted and she was closely supervised for the vast majority of the day. As a result he found this was continuous supervision or control amounting to confinement to a certain limited place for a not negligible period of time, satisfying the Storck criteria.

Mr Justice MacDonald was satisfied that the application for adjournment should be granted. He stated that whilst this court could not decide whether the Scottish court has the power to apply the nobile officium in the circumstances of this case, he found there were a number of factors that went against the expert's pessimistic attitude about the likelihood of success [§64].

As a result he found the local authority's proposed petition was sufficiently arguable [§66] to justify the adjournment. He further stated this was something that had not been considered in previous case law such as Cumbria Country Council and Ors, Re Children X, J, L and Y, and it was in M's interest, and other children in similar situations, for the matter to be subject to clarification [§69].

In the interim, he found that on the balance of convenience favoured continuation of the interim orders authorising M's deprivation pending the petition by the local authority [§76].

He raised that the Family Court Practice was in error about the ratio of various cases concerning this area [§79-81]:

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

ii. The ratio of Cumbria Country Council and Ors, Re Children X, J, L and Y is not that any orders made under the inherent jurisdiction of the English High Court authorising the deprivation of liberty of a child in a placement in Scotland not approved as secure accommodation by the Scottish Ministers will be recognised under the nobile officium jurisdiction. Rather, the ratio of the case is that where there is demonstrated a prima facie case that the nobile officium might apply to a particular type of order made under the inherent jurisdiction of the English High Court, and the balance of convenience favours an interim order pending full argument, the Court of Session is able, in an appropriate case, to grant interim orders under the nobile officium.

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

Permission