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Case No.ZE14C00018

**IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION**

Royal Courts of Justice
3rd December 2014

B e f o r e :

MR. JUSTICE HAYDEN
(In Open Court)

**LONDON BOROUGH OF BARKING AND
DAGENHAM**

Applicant

- and -

SS

Respondent

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MS. D. LEWIS (instructed by the Local Authority Legal Department) appeared on behalf of the Applicant.

MR. R. JONES appeared on behalf of the Children's Guardian..

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MR. JUSTICE HAYDEN:

1. This is an application made by the London Borough of Barking and Dagenham for a secure accommodation order pursuant to s.25 of the Children Act 1989. That provision reads as follows:

"Use of accommodation for restricting liberty

(1) Subject to the following provisions of this section, a child who is being looked after by a local authority may not be placed, and, if placed, may not be kept, in accommodation provided for the purpose of restricting liberty ('secure accommodation') unless it appears -

(a) that -

(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and

(ii) if he absconds, he is likely to suffer significant harm; or

(b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons."

The provision goes on, at subsection (3), to provide that:

"It shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied (inaudible)"

And (4):

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

2. There has been some confusion in this case by counsel as to the scope of section 25. There need be none. The core principles seem to me clear, though worth restating:

(1) It is the essence of 'curtailment of liberty' rather than any particular, or designated, establishment which underpins these orders (see *Metropolitan Borough Council v DB* [1997] 1 FLR 567);

(2) Secure accommodation is a deprivation of liberty within the meaning of Article 5 of the European Convention on Human Rights incorporated into domestic legislation by the Human Rights Act 1998 (see *Re K (Secure Accommodation Order: Right to liberty)* [2001] 1 FLR 526 CP);

(3) The two limbs of s.25(1)(a) and (b) are to be read disjunctively and not conjunctively; that is to say either the criteria under (a) or (b) is sufficient.

Both are not required (see *Re D (Secure Accommodation Order No.1* [1997] 1 FLR 197);

(4) It remains important to emphasise that there should always be a clear record of facts, when making an order under these provisions. Sworn evidence will always be necessary (see *Re AS (Secure Accommodation Order)* [1999] 1 FLR 103);

(5) When assessing the phrase "likely to abscond", the test is that applicable to the s.31 Children Act criteria, the so-called "threshold test". (see Charles J in *S v Knowsley Borough Council* [2004] 2 FLR 716);

(6) However, 'likely' in both limbs of that section must now, like the s.31 criteria themselves, be determined by reference to the clarification given by the Supreme Court in *Re B* [2013] UKSC 33 and *Re SB (Children)* [2009] UKSC 17, bearing in mind that it is not a permissible approach to find likelihood of future harm in the absence of findings predicated on actual fact;

(7) The court does not have power to make an order under s.25 in respect of a young person over the age of 16, but the order may be made prior to a child becoming 16, even if it extends beyond the child's 16th birthday ; (*Re G (See Accommodation Order)* 2001 1FLR 259

(8) Section 25 is **not** a provision to which the paramountcy principle applies. Section 25 is under the framework of Part 3 of the Children Act 1989 and, therefore, concerned with the general powers and duties of a local authority in relation to children within its area. The general duty of a local authority which applies to promote and safeguard the **welfare** of the child is not the same as the paramountcy principle. Determining welfare, though, will be illuminated, as always, by reference to the s.1(3) criteria, the welfare checklist. In these cases 'welfare' will always weigh very heavily.

3. I should add that Charles J observed in *S v Knowsley Borough Council* (supra) at p.730, para.45, as follows:

"As I have mentioned, this passage, in my view, indicates that the court, when making a secure accommodation order, must itself decide whether the s.25(1) criteria are met, but, in my view, it does not indicate that the court should decide the welfare issues relating to the duty to safeguard and promote the welfare of a child; rather the passages indicate that the court should assess such welfare issues on the basis that the local authority is the decision-maker and, thus, on the basis whether a placement of a child in secure accommodation is within the permissible range of options open to a local authority exercising its duties and functions to promote and safeguard the welfare of a child who is being looked after by it. Such a child may be one who is being provided with accommodation by the local authority or, as in this case, a child in respect of whom a care order has been made."

On the facts of this case, that distinction, if it is correctly drawn by Charles J, between the rationality of the local authority's interpretation of welfare and the Court's own evaluation of it, is, largely, illusory and, I suspect, always will be, where the liberty of a child is concerned.

4. I am here concerned with SS. Though there has been dispute about her age, it is now common

ground between the advocates and their respective parties that SS is in her 15th year. The local authority's application is for a Secure Accommodation order, and SS has already been accommodated in secure accommodation, now, for 4½ weeks.

5. In October this year, Cobb J, found that SS is 'habitually resident' in the United Kingdom. It is accepted that she was brought to the United Kingdom against her will and, whilst here, was being groomed for both sexual and financial exploitation. She was arrested by the police on 22nd April 2014 and placed under their protection. Care proceedings were commenced on 29th April 2014 and SS has been the subject of a series of interim care orders, under which aegis she still continues.
6. SS was previously accommodated at a children's home, but, in July of this year, was allocated a foster placement. During the course of this hearing, I have heard much of that foster placement and, in particular, SS's relationship with her foster carer. Secure Accommodation is a very limited resource. It is sparsely scattered across the country and there are very few units designated solely for welfare purposes: Most establishments cater for young offenders as well. I have been told the integration of these two groups, though it may be counter intuitive to the lawyer, can sometimes lead to the development of mutually positive relationships. This is merely anecdotal and I will say no more about it, I am simply not in a position to judge.
7. SS sadly, in the light of her background experiences, has only two people on whom she can rely with any confidence. The first is her social worker, a Mr. Omoriyekewmen, and the second her foster carer. Hundreds of miles away from both of them, in this secure unit, she has been able to see her social worker only once, and unable to see her foster carer at all. I find it, I am bound to say, profoundly troubling that children who are accommodated in secure units for their protection, frequently find themselves so far away from those who care for them. In the context of a criminal offender, great care would be taken to keep prisoners, particularly vulnerable youngsters, near their families wherever possible, recognising the importance of the support. This sad consequence, though, arises from the fact that there are very few units actually available.
8. Happily, and though this is no part of her duties and for which she gains no remuneration, the foster carer has spent extended periods of every day speaking to SS on the telephone; this is, to my mind, a very significant feature of this case.
9. Whilst with her foster carer, SS was progressing well, and all who have commented upon it consider that relationship to have been a good and supportive one. However, without any apparent warning, on 17th October this year, SS absconded. She was, by chance, located by the police a few days later in a motor vehicle driven by a male in his mid-30s and one other female, who, I have been told in evidence, is a sex worker. The car was stopped as part of a police operation targeting foreign criminals. SS was carrying false identification documents but a police check revealed her true identity. Police checks also revealed that the address provided by the owner of the vehicle was in fact known to the police in consequence of four young women having been charged with prostitution whilst living at that address. SS was placed under police protection and she was subsequently returned to her foster home.
10. It is a feature of SS's personality that she regularly expresses regret for her actions and profusely apologises to all the professionals around her. Frequently, to my mind, no apology is required and her behaviour is a reflection of what I have been told is a distorted sense of her own guilt and misplaced sense of responsibility for what has happened to her.
11. Within an hour of returning to her foster carer on 23rd October, SS spoke on the telephone with either a man or a woman, communicating in her native language and, shortly afterwards, left the home through the bathroom window and down the drainpipe, having tricked her foster carer into believing that she had just gone for a bath. Though she must, of course, have been sorely pressed,

the foster carer remained supportive and understanding.

12. SS placed herself not only at risk of physical and emotional harm by returning to these individuals but in physical danger by escaping from the building in the way she did. The Local Authority applied for Location and Recovery Orders, and SS, I have been informed, was subsequently located on 23rd October at the property believed to be used for prostitution. SS contacted her foster carer and, as she thought it, made arrangements to go to what she refers to as her "home".
13. During the course of this case, I have heard from SS's guardian, as well as from her social worker. It is obvious to me that they both have affection for this young person. They assess her to be naïve and vulnerable. The guardian agreed with my own observation, watching her in the courtroom, that there are times when she behaves like a child of 12 and, yet, other times when she behaves like a woman in her 30s; that is no doubt attributable to the experiences she has endured. Both agreed that she was vulnerable to exploitation and had little understanding of the risk at which she was placing herself when she absconded. In particular, it was thought that she could not identify men who were 'safe' and men who were 'dangerous'.
14. SS has been robbed of an important part of her childhood and adolescence and craves, I have been told, that which she has missed. She craves for love and security and seeks it from these dangerous men. It was for these reasons that the Local Authority, in their undoubtedly well-motivated application, contended the s.25 criteria, which I have just set out, were met.
15. It scarcely needs to be said that restricting the liberty of a child is an extremely serious step, especially where the child has not committed any criminal offence, nor is alleged to have committed any criminal offence. It is for this reason that the process is tightly regulated by the Children Act 1989 in the way I have set out, but also in the Children (Secure Accommodation) Regulations 1991 and the Children (Secure Accommodation No.2) Regulations 1991. The use of s.25 will very rarely be appropriate and it must always remain a measure of last resort. By this I mean not merely that the conventional options for a child in care must have been exhausted but so too must the 'unconventional', i.e. the creative alternative packages of support that resourceful social workers can devise when given time, space and, of course, finances to do so. Nor should the fact that a particular type of placement may not have worked well for the child in the past mean that it should not be tried again. Locking a child up (I make no apology for the bluntness of the language, for that is how these young people see it and, ultimately, that is what is involved) is corrosive of a young person's spirit. It sends a subliminal and unintended message that the child has done wrong which all too often will compound his problems rather than form part of a solution.
16. The courts have seen a number of cases in recent years where vulnerable young girls have been exploited in a variety of ways by groups of predatory men. That so many of these men escape prosecution and continue to enjoy their liberty whilst the young girls they exploit are locked up (for their own protection) sends very confusing messages to the girls themselves, to the distorted minds of the men who prey on them and to society more generally.
17. I have heard something of the regime the unit in which SS has been resident. I have no reason to believe that it is any different to any other of the welfare-based units. I equally have no doubt that those who run and work in them and the variety of disciplines which support such units are all highly motivated to help. There will be circumstances where young people have to be incarcerated to protect them, ultimately, from themselves.
18. That said, I heard that this unit has what is referred to as an "air-locked security system"; that is to say that only one room can be left open at any stage. There is no computer access. There is a reward system by which privileges are both earned, and taken away. It is difficult not to see, from the eyes of the young people concerned, a custodial complexion to this environment. It has the most profound disadvantage in the case of SS in that it must surely reinforce her own already overactive

sense of having done wrong.

19. I do not criticise the structure or regime of this, or, indeed the other units. I recognise, as I have already stated, that they have a place in the panoply of strategies required to safeguard vulnerable children, but I was not satisfied that such a regime was a proportionate interference in SS's life and so, to investigate it further, I asked Ms. Lewis, counsel on behalf of the Local Authority, whether she could contact senior officials within the unit so that I could have some closer idea both of the nature of the regime in operation and the philosophy which underpins it. At very short notice, the deputy principal was able to make herself available. She told me that, for young women in the situation of SS, such units could only really try and achieve one objective and that was to keep the young people concerned safe in a time of crisis "only long enough to find them somewhere more suitable". That seems to me to crystallise the very limited scope of this provision.
20. For the purposes of this application, I find that SS has absconded on two occasions. I doubt whether that can truly be said to be a history of absconding and it is, as I said, significant that, on the second occasion, it was she who sought to return to the foster carer. I am, however, entirely satisfied that she is likely to abscond in the future, if not in secure accommodation, in the sense that there is a real possibility of her absconding. I am absolutely sure that she is at risk of significant emotional and/or physical harm were she to do so. Whilst in the unit, she was submitted to a "screening psychological test", as it has been referred to; it indicates that she needs a nurturing environment which is predictable, in which boundaries and rules are consistently and fairly applied and where her engagement with boundaries is positively reinforced.
21. In evidence, which I found to be both open and reflective, the social worker told me, though his primary option remained Secure Accommodation, that he thought that these requirements could be met by the foster carer. The report of the clinical psychologist indicated that SS may yet have some distressing psychological symptoms related to the trauma of her experience. She had told the doctor that she is reluctant to address this or think about it at this time. She may choose, and if she does, should be offered the opportunity to gain access to some further assessment and, potentially, further intervention. The social worker told me that he could put a package of support together, which enabled SS to receive therapeutic input at the foster home.
22. I emphasise that this was very much an alternative proposal and he stood by his primary analysis, which was that SS should remain in secure accommodation. But it has taken nearly five weeks for her merely to be assessed, let alone to identify and put in place the kind of therapeutic support which it is generally believed she needs. With, to my mind, refreshing candour, the social worker acknowledged that, at the conclusion of three months, which is the maximum period for which an order can be made without review of the court, he was likely to apply for a further order so that the therapeutic work could continue. It may be a mere typographical error, but, in the paperwork, a period of six months for the secure accommodation is referred to. Whilst he stuck to his primary proposal, I felt that he moved further from it as his evidence progressed and as he reflected, both on the reality of the regime and the impact which it was having on SS. It is plain that SS has, whilst, initially, making a brave fist of the programme, come to feel its privations to be corrosive to her general sense of wellbeing, or, as she puts it, it makes her feel as if she is "dying within".
23. Her experienced Guardian felt that such a state of mind was wholly inimical to SS's continuance within the unit. Even if it had initially been appropriate the balance had now tipped decidedly against her continued incarceration. Any advantages were completely, in her analysis, outweighed by the disadvantages of remaining so confined. But the guardian was not at all comfortable with SS's return to her foster carers. She believed that a setting which reinforced a therapeutic programme 24 hours a day, seven days a week was likely to be more effective. She wanted the local authority to seek out and, hopefully, to find a specialist unit experienced in dealing with young women who had been exploited through trafficking.

24. It has been an unhappy experience in this case to discover that SS's circumstances are far from unique. Ultimately, however, no such residential unit with that specialist input was available. I have no doubt that, had one been available, that would have been in SS's interest; indeed I think that there is every prospect that, despite her resistance to it, she would have found it stimulating and likely to open up her life opportunities. But the State can only provide such facilities as it can and not only are none now available but I have heard of no prospect of them becoming available in anything like SS's own timescales. It is simply, to me, unacceptable that she should be confined until such unit is available and such would be to distort the provisions of s.25 and her own Article 8 rights. I would be failing to respect her dignity and autonomy if I allowed her to remain in the unit until an appropriate specialised residential unit became available.
25. Thought was given by the social worker and the Guardian to the option of a non specialised residential placement. SS was unequivocal and unsparing in her own view of such a course. She was profoundly resistant to it. She told me directly that, if placed there, she would run away, and many, I am afraid, in my experience, do. Ultimately, as the investigations proceeded, both the social worker and the guardian came to the view that that was not the right option for SS. But I emphasise, because she is here and listening to this judgment, that is not because she threatened to run away; rather it is because they, ultimately, did not think that, in a comparative analysis of what was available within the foster placement, a non-specialist residential home was more suitable. In other words, they made their own value judgment and that is one with which I agree.
26. It seems to me that, though it may very well be that, either disjunctively or conjunctively, 25(a) and/or (b) may be met, when I apply to them the principles of proportionality of intervention and when I look at the landscape of SS's needs, I come to the clear view that a secure accommodation order in this case would not be a justified restriction of SS's liberty and, therefore, I refuse the local authority's application. I understand that the foster carer is happy for SS to return to her.
27. I have also indicated that the Local Authority should employ strenuous efforts to serve the individual male I have referred to in this judgment with a notice of an application for an injunction. I have indicated that I intend to craft an injunction which imposes upon him a positive duty to inform the police or Social Services if SS were to contact him in any way at all. I believe, subject to submissions, which I will hear in due course, that such an injunction can be formulated in a way which is properly compliant with competing Convention Rights. I have impressed upon the local authority their obligation to attend to this as a priority, reserving any application to myself.
28. On 8th December, I expect the local authority to have filed a statement setting out the educational provision it intends to supply for SS. I also expect the statement to tell me what investigations have been made into the therapeutic support package to which the social worker alluded and when they will become available.
29. I would, finally, emphasise that one very positive feature of this otherwise challenging experience for SS has been that, for some significant period, she engaged in the educational opportunities available to her. Not only did she do that, but she did so with eagerness and enthusiasm. This reveals her to have a lively and enquiring mind and illuminates her potential. I hope she follows through with that enthusiasm for, as I have indicated to her already, it will unlock possibilities to her for the future, which have so sadly been denied to her in her past.
