Case Number: ZE18C00536

IN THE FAMILY COURT SITTING AT BROMLEY

College Road
Bromley
Kent BR1 3PX

Thursday 4.10.18

BEFORE:

HER HONOUR JUDGE LAZARUS

BETWEEN:

LONDON BOROUGH OF BROMLEY

Applicant

-and-

MRS. O

-and-

O

Respondents

Mr Wilmott, counsel instructed on behalf of the local authority
Mr McGovern, solicitor instructed on behalf of O
Ms Cockburn, O's Children's Guardian in person

JUDGMENT

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.

SUMMARY

1. This case represents yet another sorry example of the state failing a child in need, and highlights the impact of there being far too few secure accommodation unit places for children like O.
2. In summary, I have been driven *not* to grant a secure accommodation order for a child who needs one due to the unavailability of appropriate placements.
3. That is clearly a wholly unacceptable situation. He is a child in local authority care who is at risk from his disordered background and the depredations of gang life. This is the opportunity to help him and make him safe, and it is being lost.
4. Like my colleagues before me, whose published judgments increasingly feel like heads banging against brick walls, I am dismayed, frustrated and outraged; and to quote the former President of the Family Division from last year's case of ***Re X***, I am deeply worried about the risk that *'we will have blood on our hands' (#39)*.
5. I have directed that this judgment be sent by O's solicitor to the Secretary of State for Education, the Secretary of State for Communities and Local Government, and to the Children's Commissioner for England.

BACKGROUND

6. The London Borough of Bromley holds a care order for O that was granted in September 2017 as he was beyond parental control. He is 16½ and evidently at high risk of harm. He pursues gang associations in south London and is linked to so-called county line drug dealing. He had a psychiatric assessment in 2017 which identified his need for therapy to assist him with his disruptive childhood experiences and consequent conduct disorder.
7. He has been involved in the youth criminal justice system and was on remand pending sentencing in October 2016 for a street robbery conviction. He has previously been placed in secure accommodation March to August 2017 and December 2017 to February 2018.
8. These placements have managed to offer temporary containment for O and to limit his negative associations, but he and the local authority are aware of time running out for the effective provision of professional input and therapy for him in a safe environment that might help him to move away from criminality and risk.
9. The background to this current application is of significant and repeated periods missing from his placements throughout 2018, combined with property damage when angry, threats to kill, threats to send gang members after professionals, and gang-related incidents. In mid-August he absconded after some 3 weeks in a placement outside London in order to travel to south London due to his concern for a friend who had been stabbed in that area, then in late August 2018 he was arrested at 2am when Class A drugs and a machete were found in the car he was travelling in. He was not charged but was placed in police custody overnight.
10. So as a result of that history and the late August incident in particular, a secure accommodation order was sought entirely appropriately by the local authority and was granted for 14 days on 24.8.18 by Her Honour Judge Major, albeit that no beds were available and he was not therefore placed in any secure unit. The case was then listed before me on 5.9.18.
11. In August therefore, O had to be placed in an unregulated residential placement in east London from which he has persistently absconded and remained absent beyond his curfew

and sometimes for several nights at a time. Most recently and since the last hearing concerns have been raised by the local authority, in addition to his significant absence from that placement, relating to slang comments made by O on social media and as to his own safety.

12. O claims that these comments have been taken out of context and have not meant the interpretation placed on them by others, which are overly negative. He has not been arrested again since late August, and although often stays away overnight from his residential placement he informs them of his intention to do so.
13. O, to his great credit, has attended court before me on 5.9.18 and today, knowing that he might be made subject to a secure accommodation order. He is intelligent, polite and charming in court, although clearly frustrated and upset from time to time. He has provided appropriate contributions to the matters discussed.
14. As a result of his attendance at the hearing in September, and also to his credit, he agreed to attend and has attended some sessions with a specialist resource aimed at steering young people away from gangs, although he has not been able stick to all the terms of his agreement reached with the local authority last month.
15. I consider it has been in his interests to attend court, and that as a result his rights under the European Convention on Human Rights Articles 5 (liberty), 6 (access to justice) and 8 (private and family life) have been more fully considered and met than if he had not attended, and he has benefitted from direct involvement in this court process. He has been represented by his own solicitor, and his Children's Guardian has attended without representation.
16. O's mother has not attended court today, nor previously in relation to this application. She has previously stated that she cannot care for O nor manage his behaviour. I am unaware of her detailed views on this application, save that I am informed that both she and O resent the Child Abduction Warning Notice that she has been issued with. She is only prepared to work with the local authority once this is lifted. She has a criminal record and it is believed by the Police that O spends time at her home in contravention of the Notice.

CRITERIA

17. At the previous hearing on 5.9.18, I confirmed that the criteria under Section 25 (1)(a)(i) and (ii) and also (b) of the Children Act 1989 had been found to be met at the August hearing by Her Honour Judge Major, and were also met before me based upon O's history, namely that:

> *(a)(i) He has a history of absconding and is likely to abscond from any other descriptions 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.*

18. The risks of harm and injury are perhaps too obvious to set out, but are principally those covered by significant absconding associated with gang-related criminality and violence and which pose risks both to and from O of his becoming more closely and directly caught up in serious incidents.
19. However, as there were no secure placements available and O had signed an agreement at court to reside at his current residential placement and engage with various appointments and work, I adjourned the application part-heard to today's date before granting any final

order and directed that further efforts should be made to identify a placement and to evidence that research.

NO AVAILABLE PLACEMENTS

20. I am keenly aware of the notable frustration and outrage of the former President Sir James Munby in ***Re X (A Child) No.3 [2017] EWHC 2036 (Fam)*** at the lack of appropriate placements for extremely troubled children (albeit what was lacking in X's particular case was a specialist mental health unit), of the dismay and disappointment expressed by Mr Justice Hayden at the impasse reached by the lack of secure accommodation placements in ***London Borough of Southwark v F [2017] EWHC 2189 (Fam)***, and most recently echoed by Her Honour Judge Rowe QC in ***Re M (Lack of Secure Accommodation) [2017] EWFC B61***.
21. I am grateful to the social workers for their repeated and persistent efforts spending significant time and energy attempting to contact dozens of units in their attempts to find a single available placement prepared to take O.
22. In August there were 31 children waiting for a placement, and on 5.9.18 there were 35 children for whom a placement in secure accommodation was being sought. Today there were at least 25 children, and likely to rise to 26, needing a placement.
23. I have seen a schedule of the numerous and repeated enquiries made by the social workers. Their evidence is that as soon as a placement becomes available it is rapidly taken by another child, or the unit turns down O as they can easily fill their available bed by taking another child whose issues may be more straightforward than O's.
24. In effect the demand is such that it has become a distorted sellers' market and secure units have thereby acquired an unintended ability to pick and choose which children they are prepared to accept, without incurring the risk of lost income due to their beds going unfilled.
25. I accept that this ability to choose between children and reject individual cases can in certain limited situations be a legitimate exercise, for example to avoid an unhelpful combination of children in the same unit, such as where an existing resident may also have gang affiliations and which has been occasionally cited in the history of the search for a placement for O.
26. But it is likely that this distortion leads to a negative filtering exercise, with the consequence that particularly difficult or vulnerable children in need of secure accommodation are being repeatedly rejected. This leaves their needs uncatered for, their risks unsafeguarded and dangers unmitigated. This cannot be what Parliament intended by this legislation.
27. I know that the social workers plan to continue with their assiduous and thankless task of trawling for a suitable secure placement for O, and intend to act upon it if they do. However, it is a shocking but possible outcome that they will not succeed in that search.

THE LAW

28. Under Section 25 Children Act 1989 and the Children (Secure Accommodation) Regulations 1991 a local authority can detain a child for 72 hours in secure accommodation before seeking a court order, and an order of the court must be sought to extend that child's detention any further.
29. The maximum length of an initial order is 3 months, and thereafter for periods of up to 6 months.
30. The child's welfare is a relevant but not paramount consideration, section 1 of the Children Act not applying, and their consent is not required.

31. Under subsection (4) the court has no discretion but *shall* make an order if the criteria under subsection (1) are met.
32. However, the interpretation of subsection (1) and specifically the wording that precedes the required criteria in subsections (1)(a) and (b): *"…a child… may not be placed, and, if placed, may not be kept, in [secure accommodation]"* has been interpreted in the case of ***Re AK (Secure Accommodation Order) [2000] 3 FCR 289*** by Mr Justice Higgins sitting in the Family Division of the High Court of Justice in Northern Ireland. In that case the mirror provisions to section 25 and the 1991 Regulations were being considered, namely Article 44 of the Children (Northern Ireland) Order 1995 and the equivalent N.I. Regulations 1996/487.
33. The following preliminary point of law was determined: *"Is it a prerequisite… that the child is actually placed in secure accommodation prior to and at the time of a court considering the making of an order…?"*. In short, he concluded that in ordinary cases the child should have already been placed in secure accommodation before an application is made, and it is only in *"exceptional circumstances"* that an order should be made if the child is not already placed. Those exceptions would *not* include absconding or the lack of availability of a place.
34. However, it is worth considering his reasoning in detail:
    At page 299: *"If a court makes an order for a child in secure accommodation for a specified period and no placement exists, then the period of time specified will be reduced by the period of time which elapses before the child is placed in secure accommodation. Such an approach would defeat the purpose of the legislation which requires that a child be placed in secure accommodation if, inter alia, he is likely to suffer significant harm or is likely to injure himself or others. … It appears implicit in art.44 that if an authority decides that the criteria for secure accommodation are satisfied then in the interest of the child (and probably others as well) accommodation should be available to restrict the liberty of the child immediately in order to safeguard the child and others. It cannot have been the intention of Parliament to delay the implementation of a court order because the child is not amenable or because accommodation which restricts liberty does not exist or that while such accommodation exists, it is presently unavailable due to occupation by other children. That there should be a queue for access to secure accommodation seems to me to defeat the purpose of making a secure accommodation order and is inconsistent with the spirit of the 1995 Order."* (my emphasis).
    And at page 305: *"The thrust of art.44 is to empower the Trusts to place and keep children in secure accommodation for limited periods and only to involve the court should longer periods be deemed necessary. It may therefore be said that the court acts after the Trust has acted and investigates whether the criteria are satisfied and if so sets the maximum period for which the child might be kept in secure accommodation. Therefore when art.44(7) and reg.9 are considered in those circumstances the argument that the child should already be in secure accommodation has considerable force. Why has it not been raised until now? Article 44 does not specify that the child should be in secure accommodation when the order is sought. In ordinary applications one would expect a child to be in secure accommodation at the time the court application is made as a result of the circumstances which satisfy the absconding or injury criteria. I consider this is what Parliament intended and reg.9 made by the DHSS would suggest that the officials who drafted it thought so also. Should that be the situation in every application under art.44? I do not think so. This legislation requires a degree of flexibility. The circumstances which might give rise to an application under art.44 are probably numerous. I consider that in the main children should already be in secure accommodation when an art.44 application is made. They may require to be heard as emergency applications and if so the court has the option of making an interim order should*

the circumstances justify it. There may be cases where the circumstances are such that the court should deal with the application when the child is not already in secure accommodation but those cases would be exceptional. Exceptional circumstances which would justify an application when a child is not already in secure accommodation would not include in my view the fact that the child has absconded and is not amenable nor that a place in secure accommodation is not yet available." (my emphasis).

35. I am bound by Mr Justice Higgins' decision in ***Re AK*** that under Section 25(1) there is a prerequisite expectation of placement in secure accommodation prior to the application being sought, for the reasons he set out above, which can only be dislodged in exceptional circumstances. This means that if the criteria in subsections (1)(a) and (b) are met, but that the prerequisite is not, then I cannot go on to grant the application, notwithstanding the mandatory terms of subsection (4). His decision makes it clear that the failure to meet that prerequisite in a non-exceptional case rules out granting such an order, before the subsection criteria can be said to bite.
36. Although not paramount, I bear in mind O's welfare interests as relevant. I am mindful of the extremely serious nature of the court's power to order the detention of a child. Articles 5, 6 and 8 of the European Convention are engaged: O's rights to liberty, access to justice and to respect for his private and family life. This application represents a significant deprivation of O's liberty and should *'always remain a measure of last resort'* – ***London Borough of Barking & Dagenham v SS [2014] EWHC 4436 (Fam)***. It is a gross interference with O's rights. As such it is particularly important to do so proportionately and in circumstances where the intention of the legislation can be properly met.

ANALYSIS & CONCLUSION

37. Given the analysis in ***Re AK***, it follows in this case that it largely defeats the purpose of such an order if the limited time that can be ordered starts to run while O is still out in the community, and where the legislation provides that the local authority has the power to act and detain O for 72 hours in secure accommodation once a unit becomes available and is prepared to take him.
38. This reasoning is particularly strong in this case, where no bed has been found for O since searches began 6 weeks ago on 24.8.18. It is therefore highly likely that a significant proportion of a time-limited secure accommodation order granted now would expire and be wasted while O remains in the community and further unsuccessful searches are made for a placement for him.
39. I must also consider whether exceptional circumstances exist here that would enable me to grant a secure accommodation order notwithstanding the repeated non-availability of a suitable placement for O.
40. O's circumstances are grave enough to mean that both limbs of the criteria under subsections (1)(a) and (b) are satisfied. But much as I would like to try and twist an interpretation of 'exceptional' to apply to him here, I cannot properly do so; his circumstances are serious and dangerous enough to satisfy the criteria, but sadly are not exceptionally so. There are many children at risk from gang life, who are vulnerable due to their childhood experiences, and who find it hard to manage their feelings and behaviour which leads them to make risky and dangerous choices, and for there to be risks of violence and threats both from them and to them.
41. Inevitably, whether an order were granted in the absence of an available placement now or whether the local authority seeks to exercise its 72 hour power to detain him once they find

a placement, there will be a difficult and possibly dangerous and unsuccessful cat-and-mouse chase to find and remove O to secure accommodation unless he co-operates. This is a great shame, given that O had come to court voluntarily twice and has inevitably found this process difficult, and adds to the risks faced by O but does not make this case exceptional.

42. Following ***Re AK***, the very lack of placements and queuing for a placement and the filtering out of difficult cases by secure units cannot be factors treated as making O's case exceptional. Those factors have nothing to do with O, and everything to do with the systemic failures identified by the former President last year in ***Re X***.
43. In that case the former President was dealing with a suicidal teenage girl: an emotive figure. Here, the fact that O is a young male with gang affiliations should not make him a less needful, sympathetic or deserving candidate for the safeguarding, containment and protection he (and others and the community) need.
44. So it is with great regret, concern, and dissatisfaction that I am driven not to grant a secure accommodation order for O today. His case is not so exceptional as to justify making an order where no placement is available for him; it is not in his interests for such an order to start to run while he is still in the community; and to grant an order in these circumstances would defeat the immediate safeguarding purpose and the spirit and intention of the legislation.
45. I do not take the same course as Mr Justice Hayden in ***LB of Southwark v F***, who listed the case before him every day due to its worrying severity until it was resolved, and required the attendance at court of Southwark's Deputy Director of Social Services and the availability by telephone of a decision-maker from a potential secure unit. I do not consider such a step is proportionate in O's case.
46. I also make it clear that, although often raised, it has not been an argument suggested to me by the local authority that I should make a secure accommodation order with the purpose of thereby somehow 'getting into the queue' and achieving some advantage by doing so. Given the decision and analysis in ***Re AK*** that would not be a permissible approach nor meet the intention of the legislation unless O's were an exceptional case.
47. Instead, however, the situation now returns to be managed by the local authority, and it is equally clear that its power to detain for 72 hours is appropriately available in O's case given his circumstances, and in the event that their search for a placement is successful and the local authority exercises that power and wish to extend his detention beyond that period then an application should urgently be made, and if possible before me.
48. It seems that local authorities have woken up to their duties to those young people who are falling prey to gang life, and are properly treating this as a child protection and safeguarding concern. It also seems unfortunately clear that the systems in place to service this need are inadequate; as is witnessed by the circumstances of this case. But also as is evident by the applications increasingly made to the High Court by local authorities under the inherent jurisdiction to obtain non-statutory approval of detentions of children due to the lack of secure accommodation, and about which the current President of the Family Division has expressed significant concerns as recently as in a judgment given last week: ***T (A Child) [2018] EWCA Civ 2136***.
49. In effect, as I have already mentioned, the current situation cannot be what Parliament intended. The inability to place a child in a secure accommodation makes a nonsense of the immediacy of the safeguarding need identified in the risk and injury criteria. And this appears to be paradoxically and dangerously worse for children who are 'more difficult' and so are harder to place due to the unintended consequence whereby secure units may now

pick and choose more readily between children, which must run completely contrary to the intention of the legislation.

50. Of course this begs a range of critical questions as to how this situation has arisen, and how the state proposes to address the system failures it exposes in order to meet its duty to vulnerable children and the wider community, and in order to make this legislation and the orders being sought under it meet the intention of Parliament. These are not questions to be answered in this case or in this forum, but, as identified by the current and former Presidents and Mr Justice Hayden, are very troubling in their implications.

51. I thank the social workers for their hard work trying to look after O's interests, and I expect them to continue to try to do so while facing the almost impossible difficulties of this impasse. I also thank the Children's Guardian and O's solicitor for their efforts on O's behalf. I accede to O's solicitor's request that this judgment should be published, and I direct that he sends this judgment to the public office holders identified above. I note that he intends to try and follow this case through by contacting relevant government departments and statutory bodies. Finally, I thank O for coming to my court and managing himself and a difficult situation so well. I send him my best wishes and encourage him to stay at his residential placement, to keep in touch with his social workers and his solicitor, and to keep attending all his appointments and to keep trying to do the right thing and make the right choices.

Her Honour Judge Lazarus

5.10.18