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.

NEUTRAL CITATION [2021] EWHC 440 (Fam)

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

IN THE MATTER OF THE SENIOR COURTS ACT 1981

AND IN THE MATTER OF Y

10, 12 AND 18 FEBRUARY 2021

BEFORE MR L. SAMUELS QC SITTING AS A DEPUTY HIGH COURT JUDGE IN PRIVATE

B E T W E E N:

THE LONDON BOROUGH OF X

Applicant

- and –

M

First Respondent

- and –

Y

Second Respondent

Ms M. CUDBY (instructed by London Borough of X) appeared on behalf of the Applicant.
The First Respondent appeared in person.
Ms G. MITROPOULOS (instructed by Miles & Partners LLP) appeared on behalf of the Second Respondent.

The London Borough of X v Y (Deprivation of Liberty in Scotland)

APPROVED JUDGMENT

1. This is an application by the London Borough of X for orders permitting the local authority a) to place a child Y outside of the jurisdiction, in Scotland, pursuant to paragraph 19, Schedule 2, Children Act 1989; b) to deprive Y of his liberty and c) to utilise the services of a secure transport company to transport Y to the proposed placement in Scotland, using reasonable force if necessary.

2. I granted the orders sought at a hearing on 12 February 2021 and sent out a draft of this judgment on 17 February 2021 to explain my reasons for doing so. In light of further information provided at the hearing on 18 February 2021 I have amended this judgment.

3. This judgment does not raise any new point of law or procedure, but is published in order strictly to comply with the Practice Guidance on Transparency in the Family Courts issued on 16 January 2014. It highlights again the lack of suitable placements available within England and Wales to accommodate young people with particular needs.

4. Y is a vulnerable and troubled 15 year old boy. He is subject to a final care order made in 2018. His placement in London has been unable to contain him. He has absconded from the placement on a regular basis. He has been involved with a number of gangs. He did not attend school or engage in any other form of education. He was known to smoke cannabis. There were concerns he was being exploited and possibly trafficked. He has money and expensive items of clothing and has been unwilling to say how he has obtained these. There is a concern he is dealing in drugs. He was believed to be running county lines. He is currently subject to a youth referral order having been arrested in the summer of 2020 for carrying a bladed article and assault. In January 2021 he sustained a significant injury to his hand and was unable to give a clear account of how it happened. A few days before this application was made he was stabbed and sustained a 20 cm laceration to his buttock. The consequences of that injury could have been life changing. Had the assault been to a different part of his body he could have been killed.

5. It was clear that staff at Y's current placement could no longer keep him safe. He was at an immediate risk of significant harm or death.

6. This application was issued on Wednesday 10 February 2021 and came before me that afternoon, as Applications Judge. I was informed that Y's mother (M) supported the application, although she would have preferred Y to have been placed closer to home. The application was opposed by Y himself. No Guardian had yet been appointed to represent Y and Cafcass had not been given notice of the application. It was not clear from the evidence filed a) why it was proposed to move Y to Scotland rather than to a placement in England or Wales, b) whether the placement was approved as secure accommodation by Scottish Ministers and c)

what the training and qualifications were of those it was proposed should transport Y to Scotland.

7. It was also apparent that the local authority had not had time to consider the legal complexities that would arise from the proposed placement in light of the matters discussed in the cases *Salford CC v M* [2019] EWHC 1510 (Fam), [2020] 1 WLR 371, [2019] 2 FLR 1124 (MacDonald J.) and *Re H (Interim Care: Scottish residential placement)* [2020] EWHC 2780 (Fam) (Cobb J.); in particular, the need to ensure that any order made by this Court would be recognised in and have legal authority in Scotland.

8. For all those reasons I decided to adjourn the application for a very short time, re-listing it on the morning of Friday 12 February 2021. I was concerned about the draconian nature of the proposed order which involved approving the removal of a 15 year old child from the jurisdiction without his consent or participation in the hearing. I made it clear that had the proposal been to move him to a DOLS regulated placement in England and Wales then I would have approved that in the interim, subject to being satisfied as to the transportation arrangements.

9. The application came back before me on 12 February 2021 as directed. Y was represented by his Solicitor from the previous care proceedings who set out his position to me. Y opposed any DOLS restrictions as unnecessary. He had said that he wants to work co-operatively with the local authority, which is positive. He accepted that he should move away from London but, not unreasonably, argued that Scotland was too far. I was told he did not actually know where Scotland is. He was, however, aware that it would involve a significant journey by road and pointed out that the location of his wound makes travelling in a car for even short distances very painful.

10. A Guardian had also been appointed for Y. She informed me that having considered the application and evidence and spoken to Y, she supported the application. She was, however, concerned as to why a placement had not been available to him in this jurisdiction.

11. The local authority had, since the hearing 2 days earlier, filed a further statement and a chronology of their attempts to find a placement for Y within this jurisdiction. The statement set out the qualifications and training of the staff at the proposed placement. It described the supervision, support and services that Y would be provided with and the activities that the placement would attempt to engage him in, including therapeutic services and education. It also set out the secure transport service that was to be used and the plan for the journey. I was assured that the staff undertaking the journey would be fully trained specifically in restraining young people using minimal force or restraint.

12. I was initially informed that the placement is approved as secure accommodation by Scottish Ministers. However, it later transpired that this was inaccurate. I was also, initially, provided with a different address for the placement. I am not sure whether the two issues are connected. I now understand that the placement is newly registered and so is yet to be inspected

by the Care Inspectorate in Scotland. It offers accommodation for up to two children at a time. Y is, at present, the only child placed there.

13. I was informed on 12 February that the local authority was now alive to the legal issues that would arise from such a placement and would be urgently considering issuing a Petition to the Inner House of the Court of Session asking the Scottish Court to invoke the *nobile officium*.

14. The chronology of enquiries made to find an alternative placement is a substantial document. It details a request sent to more than 100 providers in England and Wales to identify a placement that could accommodate a DOLS order. There were no location restrictions imposed. The initial email request was followed up by a telephone enquiry. The process was repeated a number of times. Not a single placement was identified that was able or willing to offer Y a place. Where reasons were given, these involved issues such as matching considerations, inability to implement the DOLS order, lack of availability and inability to meet Y's needs. Not all those contacted responded or offered a reason why they could not offer Y a place. It was only when the search was extended to Scotland that a placement could be identified.

15. In light of the evidence filed and the representations of the parties and the Guardian I could not leave Y any longer at immediate risk of significant harm or death. His placement in London was unable to contain him or keep him safe. Without DOLS restrictions there is a significant risk that Y would simply abscond from any new placement. There is also a risk that he will carry a bladed implement that could cause harm to others or to himself. Continued access to a telephone or the internet might enable him to alert others to where he is, compromising the safety of the placement. The local authority had undertaken extensive searches and the only placement available was the one now identified in Scotland. They had agreed to keep the matter under review and to take all necessary steps to obtain legal authority in Scotland to secure the placement. The journey would be uncomfortable for Y but it was unavoidable. It was clearly in Y's best interests that he be moved immediately to another location and placement.

16. Accordingly, I granted permission to the local authority to place Y in Scotland and approved the following DOLS order as the least restrictive and a proportionate response to the risk of harm which arises. As amended on 18 February 2021, I have authorised that:

(a) Y to be subject to 24 hour supervision on a one to one basis.

(b) Doors and windows to be locked to prevent Y from leaving the placement without permission.

(c) Y to be accompanied at all times when he leaves the placement.

(d) Y may use his telephone to have contact with his family and for the purposes of accessing music, playing games, and similar and on the understanding that staff may check the phone from time to time; but not to make calls or access the internet without supervision. Arrangements will be made to enable Y to have contact with his mother and other family members by telephone and / or video call at least every other day.

(e) If Y asks to contact friends, this should be vetted and approved by the local authority.
(f) Y not to have access to significant sums of cash (above £5) and his personal allowance will be held by the placement staff, to be spent by Y under the supervision of staff.
(g) Y's possessions to be searched as necessary and permission is granted to remove any telephone or other electronic device and to remove any item considered dangerous to Y, other residents or members of staff at the placement such as knives or makeshift weapons.
(h) Y to be subject to appropriate and safe physical restraint by placement staff and the Police if he is at risk of causing physical harm to himself or another person or attempts to run away from the placement or to run away from staff or the Police when in the community.
(i) Y to be transported to the placement by staff appropriately trained specifically in restraining young people using minimal force or restraint.

17. I also authorised the use of force to deprive Y of his liberty, using the minimum degree of force or restraint required. I said that the use of such force or restraint is lawful and in his best interests provided always that the measures are:
(a) The least restrictive of Y's rights and freedoms;
(b) Proportionate to the anticipated harm;
(c) The least required to ensure the Y's safety and that of others;
(d) Respectful of Y's dignity; and
(e) Implemented by staff who are appropriately trained.

18. In making that order I determined that it was lawful, necessary and proportionate for Y to be deprived of his liberty as set out above. I also determined that it was in his best interests, as I have said.

19. I directed a further review of the case on 18 February 2021. I was informed at that hearing that the journey to Scotland took 11 hours, overnight, and he arrived at shortly before 5 am. The journey must have been very uncomfortable for Y given his injury. It was positive to hear that Y had travelled to the placement willingly and there had been no problems on the journey. It is also positive that he likes the house and the staff and has settled in well. He is polite and pleasant to the staff. He shows gratitude to them and says he wants to change his behaviour. That is all very welcome news. However, understandably, he feels a long way from his family and friends and would like to be nearer to them. I understand that the local authority has not yet been able to any identify any alternative placement for him, but it is early days.

20. At that hearing I made an adjustment to the DOLS authorisation as requested by Y, to allow him greater access to his telephone so that he can listen to music, play games upon it and undertake similar activities. I also allowed Y to attend the hearing, at his request. I emphasised to Y that his co-operation was very positive and welcome. His participation in these proceedings is also welcome and he will always be listened to. He has asked me to keep the need for any DOLS restrictions under very active review and I will do so. I have listed the matter for a further hearing on 17 March 2021. In the meantime, I remain available to consider any issues that arise by email.

21. I emphasised at the hearing that I am not ordering that Y be deprived of his liberty, I am authorising it. The detailed management of any authorised restriction is a matter for the local authority to decide, in discussion with the placement, Y's mother and of course Y himself. Active reconsideration of the level of restriction will be necessary once there has been a building of trust between Y and the placement and Y and the local authority.

22. In making these orders I am aware of and familiar with the legal principles to be applied. These are set out in a number of recent cases including *Salford CC v M* and the decision of Cobb J in *Re RD (Deprivation or Restriction of Liberty)* [2018] EWFC 47. It is not in dispute that the arrangements proposed by the local authority engage Y's Article 5 ECHR rights to liberty and security of person and his rights under Article 37 of the UN Convention on the Rights of the Child. The proposed restrictions meet the test for a deprivation of liberty set out in the European Court of Human Rights decision in *Storck v Germany* (2006) 43 EHRR 6 and the *'acid test'* under *Cheshire West and Chester v P* [2014] AC 896, namely that (a) Y is unable to consent to the deprivation of his liberty, (b) he is subject to continuous supervision and control and (c) he is not free to leave. Y's circumstances in the placement are, sadly, far different from the restrictions that would normally apply to a child of his age, station, familial background and relative maturity who is free from disability (*Re A-F* [2018] EWHC 138 (Fam)).

23. This case raises an issue which is likely to be determined by the Supreme Court in *Re T (a child)* UKSC 2019/0188, namely whether it is lawful to make orders under the inherent jurisdiction to place a child in an unregistered secure home. Judgment is currently awaited in that case. In the meantime, the current authorities do support the lawfulness of such a placement.

24. There is a potential issue here as to whether Paragraph 19, Schedule 2, Children Act 1989 is the correct procedural route to secure a placement in Scotland in these circumstances. This was a matter considered by Cobb J in *Re H (Interim Care: Scottish residential placement)* above. However, this issue has not been argued before me and, if appropriate, will need to await further reflection and consideration.

25. This case bears an obvious factual similarity to the case of *Salford CC v M* before MacDonald J. There, as here, the placement was not secure accommodation in terms of the Children's Hearing (Scotland) Act 2011, section 202 because it is not a residential establishment approved by Scottish Ministers under regulations made under section 78(2) of the Public Services (Reform) Scotland Act 2010. I note the extensive legal argument before that Court, and the expert evidence adduced, on the issue of whether it was appropriate to authorise a deprivation of liberty where the proposed placement was in Scotland and had not been approved as secure accommodation by the Scottish Ministers. It was common ground there, as here, that the only available route in Scotland to secure legal authority for such a placement was to petition the Inner House of the Court of Session for relief under the *nobile officium*, the extraordinary jurisdiction of the Court of Session. MacDonald J determined that, pending the local authority's petition, it was appropriate to continue the interim orders

depriving the child in that case of her liberty. He recognised, in so doing that, unless the Court of Session agreed to invoke the *nobile officium,* such a placement may be without legal authority in Scotland.

26. MacDonald J cited the decision of Munby P in *Re X (A Child) and Y (A Child)* [2016] EWHC 2271, where the court recognised the power under the inherent jurisdiction to place a child in Scotland in a placement not approved by Scottish Ministers as secure accommodation. Following that decision, the Inner House of the Court of Session in Scotland examined three petitions for the exercise of the *nobile officium,* in *Cumbria County Council and Ors, Re Children X, J, L and Y* [2016] CSIH 92. The court recognised, in that case, the ability of the Scottish court to make interim orders under the *nobile officium*, where there was 'a clear prima facie case' for its exercise and the balance of convenience favoured such an interim order having regard to the individual circumstances of the child concerned. However, as noted by MacDonald J, that case considered only whether interim relief should be granted and was not concerned with the wider question of whether the *nobile officium* was capable of being and should be invoked as a matter of course to recognise deprivation of liberty authorisations or authorisations where the placement had not been approved as secure accommodation by Scottish Ministers.

27. As I understand it the question posed in the concluding paragraph (para 81) of MacDonald J's judgment in *Salford v M* remains undecided, namely "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". As he observed earlier in his judgment (para 62), "that is a matter solely for the sovereign courts of Scotland."

28. Just before the hearing on 18 February 2021 I received a copy of the petition issued by the local authority to the Inner House of the Court of Session. That petition underlines the exceptional nature of the present case and the current "lacuna in the statutory schemes for dealing with intra-UK cross border placement of children". Just after the hearing I received a copy of the interim order of that court directing that my order "shall be recognised and enforceable in Scotland as if they had been made by this Court". That order is of one week's duration. The matter is to be reconsidered by that court on 25 February 2021.

28. I would conclude by observing that, whatever the legal outcome of the proceedings in Scotland, this case is but another example highlighting the lack of regulated placements in England and Wales for troubled young people. Indeed, having read the very recent judgment of MacDonald J. in *Lancashire County Council v G and N* [2021] EWHC 244 (Fam), it is a positive for Y that at least a placement for him in Scotland is available that appears to be capable of meeting his needs.

23 February 2021

L. Samuels QC Sitting as a Deputy High Court Judge.